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VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1962

No. 76

JAMES GALLICK, PETITIONER,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OHIO, CUYAHOGA COUNTY

PETITION FOR CERTIORARI FILED MARCH 3, 1962
CERTIORARI GRANTED APRIL 16, 1962

SUPREME COURT OF THE UNITED STATES

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[fol. A]

IN THE COURT OF COMMON PLEAS IN AND FOR COUNTY OF CUYAHOGA, STATE OF OHIO

No. 697,202.

JAMES GALLICK, Plaintiff,

vs.

THE BALTIMORE AND OHIO RAILROAD CO., Defendant.

AMENDED PETITION—Filed September 8, 1958

Now comes the plaintiff and after having duly obtained leave of court files this his amended petition. Plaintiff for his cause of action says that at all times herein alleged the defendant was and is a railroad corporation, organized and existing under the laws of the State of Maryland, and was at the time of the occurrence herein set forth and is now carrying on its business as an interstate common [fol. B] carrier of passengers and freight within the jurisdiction of this court; that at all times herein alleged, plaintiff was and is a resident of the City of Parma, County of Cuyahoga and State of Ohio, employed by the defendant as a Yard Foreman, in which capacity the plaintiff was engaged in the movement, switching and classification of freight cars on tracks of the defendant located in the vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, County of Cuyahoga, State of Ohio; that the action of plaintiff is brought under, and is governed by the provisions of the Federal Employers' Liability Act, 45 USCA, Sections 51-59 and Amendments thereto; that the work duties of the plaintiff at all times herein alleged substantially affected and were in furtherance of interstate commerce.

Plaintiff further says that in the month of August, 1954, the exact date and time being uncertain, he was engaged

in the performance of his duties involving the movement, switching and classification of railroad freight cars at defendant's tracks located in vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, County of Cuyahoga, State of Ohio; that in close proximity to said tracks in August of 1954, and for a long time prior thereto to the knowledge of the defendant, there existed a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs, lice and vermin; that plaintiff was required to perform his work duties in close proximity to said area; that in the month of August, 1954, while performing his usual and customary work duties in and about the Columbus Road Bridge and Lime Road tracks of defendant, the plaintiff was bitten by [fol. C] an insect following which he developed serious, painful and disabling injuries as will be described hereinafter.

Plaintiff further says that the defendant was negligent in the following respects:

1. In that it required plaintiff to perform his work duties in close proximity to an area which was known by the defendant to be infested with dead pigeons, rats, bugs, lice and vermin.

2. In that it failed to drain said stagnant pool of water which would have eliminated the hazard to the health of the employees compelled to work in the vicinity of said area and more particularly, this plaintiff.

3. In that it failed by the use of chemicals or otherwise to eliminate from the said area where plaintiff was required to work the accumulations of dead pigeons, rats, bugs, lice and vermin, although it knew of said condition which existed for many years prior to the injury to plaintiff.

4. In that it failed to provide plaintiff with a reasonably safe place in which to perform his work duties.

5. In that it failed to inspect and spray the empty freight cars being moved, switched or classified in the

vicinity on the track of the defendant near Lime Road and the Columbus Road Bridge to rid the same of insects, bugs, lice and vermin.

6. In that it knew that by permitting said pool of stagnant water to accumulate dead pigeons, rats, bugs, and vermin, insects would be attracted to said area, and that its employees would have to work under unhealthful and unsanitary conditions.

Plaintiff further says that by means of and in consequence of the foregoing negligent acts and omissions of [fol. D] the defendant, and as the direct and proximate result thereof, he was caused to be bitten by an insect which caused his system to become poisoned and which resulted in the formation of deep, acute ulcerations with draining about his extremities and body, which condition has not abated with time.

Plaintiff further says that as a result of his injuries, it had been necessary for him to undergo extensive hospitalization, medical care and attention, and surgery, for all of which he has sustained expense, the full extent and amount of which is, as yet, unascertainable inasmuch as plaintiff is receiving medical care and attention and hospitalization at the time of filing this, his amended petition.

Plaintiff further says that his injuries have necessitated surgery for the amputation of both legs, that he is confined to his hospital bed and a wheel chair and will remain so into the indefinite future.

Plaintiff further says that his injuries have caused him to suffer an extreme weight loss and necessitated that he consume large quantities of narcotics in an attempt to relieve his pain.

Plaintiff further says that as a result of his injuries, he has suffered and will suffer permanently from pain, great mental anguish, extreme nervousness, an inability to obtain normal rest, weight loss, cosmetic disfigurement, an inability to get about, and extreme worry, grief and anxiety.

Plaintiff further says that his injuries have rendered him an invalid and that he needs constant care and attention to his person.

Plaintiff further says that prior to the foregoing occurrence, he was regularly employed, earning and capable [fol. E] of earning substantial wages but that as a result of his injuries, as aforesaid, he has been rendered totally incapacitated from resuming his railroad occupation or any other gainful occupation which condition will continue into the indefinite future.

By means of and in consequence of which plaintiff has been injured and damaged in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

Wherefore, plaintiff prays judgment from the defendant herein in the sum of Seven Hundred Fifty Thousand Dollars ($750,000.00).

A. H. Dudnik, Meyer A. Cook, Attorneys for Plaintiff.

IN THE COURT OF COMMON PLEAS

ANSWER TO AMENDED PETITION—Filed December 17, 1958

First Defense.

Now comes defendant and for its first separate defense to plaintiff's amended petition admits that it is a railroad corporation organized and existing under the laws of the State of Maryland, and maintains certain tracks in the vicinity of Lime Road and the Columbus Road Bridge in the City of Cleveland, Ohio; admits that during the month of August, 1954, plaintiff was employed by defendant in the capacities of yard foreman and yard helper, engaged in the movement, switching, and classification of freight cars over certain tracks of defendant located in the City of Cleveland; admits that plaintiff's cause of action is brought [fol. F] under the provisions of the Federal Employers' Liability Act, 45 U. S. C. A. §§ 51-59, as amended; and admits that plaintiff's duties as yard foreman and yard helper were in furtherance of interstate commerce.

Not intending to deny that plaintiff may have been required in the course of his duties as yard foreman or yard helper to be present from time to time during the month of August, 1954, at or near the tracks of defendant which

are located in the vicinity of Lime Road and the Columbus Road Bridge, or that plaintiff has suffered from a serious and painful disability subsequent to August, 1954, plaintiff does deny for lack of knowledge that there existed at that time a pool of stagnant water or other unsanitary condition for which the defendant was responsible in the vicinity of its tracks at Lime Road and the Columbus Road Bridge; denies that plaintiff's illness or disease was proximately caused or contributed to by the negligence of this defendant, its agents, servants, or employees, either in the respects alleged in the amended petition or in any other manner, and specifically denies the existence of any connection whatsoever between the condition of defendant's tracks and roadbed and the insect bite allegedly sustained by plaintiff while employed as a yard foreman or yard helper for defendant during the month of August, 1954.

Further answering, defendant says that if it be true that the illness or disease from which plaintiff now suffers was caused or contributed to by an insect bite sustained by him on defendant's premises or elsewhere, the likelihood of harm and consequences to plaintiff therefrom [fol. 6] were beyond the realm of reasonable probability or foreseeability, with the result that no duty arose requiring the exercise of care by defendant to protect plaintiff from any such risk; and defendant further says that if it should be found that such risk should have been foreseen by this defendant, no reasonable method or means was available to it which could have eliminated, controlled, or appreciably reduced the numbers or types of insects in and about its premises.

Further answering, defendant denies each and every allegation contained in plaintiff's amended petition save and except those hereinabove expressly admitted to be true.

Second Defense.

For its second separate defense to plaintiff's amended petition, defendant incorporates herein by reference and makes a part hereof the preceding portions of this its answer and says that if it should be found that plaintiff's disability was caused in whole or in part by the negligence

of this defendant, which defendant specifically denies, then neither said disability nor the insect bite which is claimed to have occasioned it constitutes an "injury" within the meaning of the Federal Employers' Liability Act, and that plaintiff may not recover in this action.

Wherefore, having fully answered, defendant prays that plaintiff's amended petition be dismissed and that it may go hence with its costs without day.

Baker, Hostetler & Patterson, Attorneys for Defendant.

[fol. H]

IN THE COURT OF COMMON PLEAS

REPLY—Filed June 16, 1959

For his Reply to the Answer of the defendant to plaintiff's Amended Petition, plaintiff denies each and every fact, statement and allegation contained therein save and except such as are an admission of a fact, statement or allegation contained in the Amended Petition of Plaintiff.

For his further Reply plaintiff re-alleges and re-avers the facts, statements and allegations contained in his Amended Petition, and prays for judgment as in his Amended Petition he has prayed.

A. H. Dudnik, Attorney for Plaintiff.

IN THE COURT OF COMMON PLEAS

JOURNAL ENTRY OF JUDGMENT—July 20, 1959

The Court finds that the jury in the within cause was duly impanelled and sworn; that proper request was made to the Court by the defendant for a special verdict as provided by law; and that a special verdict was returned by the jury.

The Court further finds that the photographic copies annexed hereto as Exhibits "A, B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W" are an exact repro-
[fol. I] duction of the original special verdict returned by

the jury and made a part of the record of the within case; and that said Exhibits annexed hereto as Exhibits A through W constitute the verdict of the jury."

The Court being fully satisfied that Exhibits A through W annexed hereto constitute the verdict of the jury, the Court hereby incorporates the same by reference as part of this Journal Entry as though expressly rewritten herein.

The Court further finds that proper request was made by the defendant for the submission of a separate finding of fact by the jury and that Exhibit "X" annexed hereto is an exact photographic copy of the finding of fact of the jury. The Court therefore incorporates Exhibit "X" as annexed hereto as a part of this Journal Entry as though expressly rewritten herein.

The Court being of the opinion that the special verdict of the jury as referred to and incorporated within this Journal Entry and annexed hereto as Exhibits A through W is sufficient in law to require a judgment for the plaintiff; and the jury by said special verdict having found that plaintiff's damages are Six Hundred Twenty Five Thousand Dollars ($625,000.00); and the Court being of the opinion that the finding of fact of the jury, as referred to and incorporated within this Journal Entry and annexed hereto as Exhibit "X" is consistent with the verdict of the jury; it is hereby ordered that plaintiff recover of the defendant the said sum of Six Hundred Twenty Five Thousand Dollars ($625,000.00), for which sum, with the costs of this action, judgment is hereby rendered in favor of plaintiff and against the defendant."

[fol. J] SPECIAL VERDICT.

Exhibit A.

We, the jury, being first duly impanelled and sworn and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence, the following determinative issues in this cause:

1. Did a pool of stagnant water exist under the Columbus Road Bridge during the entire early part of August, 1954? Yes.

(Names of twelve jurors omitted.)

Exhibit B.

We, the jury, being first duly impanelled and sworn, and being three-fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

2. Was the pool of stagnant water on the premises of the defendant B. & O.? Yes.

(Names of twelve jurors omitted.)

Exhibit C

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

3. If the answer to 2 is yes, was the defendant B. & O., in possession of the premises under the Columbus Road Bridge whereon the stagnant water stood? Yes.

(Names of twelve jurors omitted.)

[fol. K] Exhibit D

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

4. Did the defendant B. & O. have under its control the premises under the Columbus Road Bridge wherein the stagnant water stood? Yes.

(Names of twelve jurors omitted.)

Exhibit E

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

5. If the answer to question No. 2 is yes, did dead pigeons accumulate under the bridge in the stagnant water? Yes.

(Names of ten jurors omitted.)

Exhibit F.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

6. If the answer to No. 2 is yes, did dead rats accumulate under the bridge in the stagnant water? Yes.

(Names of nine jurors omitted.)

[fol. L] Exhibit G.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

7. If the answer to No. 2 is yes, did vermin accumulate under the bridge in the stagnant water? Yes.

(Names of twelve jurors omitted.)

Exhibit H.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

8. If the answer to No. 2 is yes, did bugs accumulate under the bridge in the stagnant water? Yes.

(Names of twelve jurors omitted.)

Exhibit I.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number

thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

9. Was plaintiff required to perform his work duties in close proximity to the area referred to in question No. 1? Yes.

(Names of twelve jurors omitted.)

[fol. M] Exhibit J

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

10. On approximately August 10, 1954, was plaintiff bitten by an insect? Yes.

(Names of twelve jurors omitted.)

Exhibit K

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

11. If the answer to Question No. 10 is yes, was he bitten while performing his usual and customary work duties? Yes.

(Names of twelve jurors omitted.)

Exhibit L

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

12. If the answer to No. 10 is yes, was he bitten near or about the Columbus Road Bridge? Yes.

(Names of twelve jurors omitted.)

[fol. N] Exhibit M

We, the jury, being first duly impaneled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

13. Did the defendant B. & O., provide the plaintiff, Mr. Gallick, a reasonably safe place to work under the facts and circumstances existing at the time?

Jury can't decide on this question.

Exhibit N

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

14. If the answer to question 1 is yes, did the defendant B. & O. know that by permitting the accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs and vermin would be attracted to said area? Yes.

(Names of ten jurors omitted.)

Exhibit O

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

15. If the answer to 14 is yes, did the defendant B. & O., know that its employees would have to work in this area? Yes.

(Names of ten jurors omitted.)

[fol. O] Exhibit P

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

16. Was the defendant negligent in one or more of the particulars alleged in the petition? Yes.

(Names of twelve jurors omitted.)

Exhibit Q.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

17. If the answer to Question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence.

There existed a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs and vermin.

(Names of ten jurors omitted.)

Exhibit R

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

18. Was the illness or disease from which Mr. Gallick now suffers caused in whole or in part by an insect [fol. P] bite sustained by him on defendant B. & O.'s premises? Yes.

(Names of twelve jurors omitted.)

Exhibit S.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

19. Were the injuries to the plaintiff proximately caused in any part, even the slightest, by any one or more of the acts or omissions of the defendant? Yes.

(Names of twelve jurors omitted.)

Exhibit T.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

20. If the answers to any one of the questions numbered 1, 5, 6, 7, and 8, is yes, was there any reason for the defendant B. & O., to anticipate that such would or might probably result in a mishap or an injury? No.

(Names of ten jurors omitted.)

Exhibit U.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

[fol. Q] 21. Was there a proximate causal relationship to the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? Yes.

(Names of twelve jurors omitted.)

Exhibit V.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B & O to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? No.

(Names of twelve jurors omitted.),

Exhibit W.

We, the jury, being first duly impanelled and sworn, and being three fourths or more of the whole number

thereof, do find by the greater weight of the evidence the following determinative issues in this cause:

23. What amount of money will compensate the plaintiff, James T. Gallick, for his injuries and damages, if any, resulting proximately from this accident?

$625,000.00.

(Names of twelve jurors omitted.)

Exhibit X.

Interrogatories.

5(a) Where on plaintiff's body was his first skin infection?

Answer: Back of left leg approximately 4" above knee—more to the outside.

(Names of twelve jurors omitted.)

[fol. S]

IN THE COURT OF COMMON PLEAS

No. 697202

[Title omitted]

JOURNAL ENTRY—July 16, 1959

Defendants motion for judgment on special verdict. Overruled.

Victor Cohen, Judge.

[fol. T]

IN THE COURT OF COMMON PLEAS

No. 697202

[Title omitted]

JOURNAL ENTRY—September 29, 1959

Motion for judgment notwithstanding the verdict. Overruled.

Victor Cohen, Judge.

[fol. U]

IN THE COURT OF COMMON PLEAS

No. 697202

[Title omitted]

JOURNAL ENTRY — September 29, 1959

Defendant, Baltimore and Ohio Railroad motion for a new trial is hereby overruled. No record.

Victor Cohen, Judge.

[fol. 1]

The State of Ohio,)
) ss.:
County of Cuyahoga)

IN THE COURT OF COMMON PLEAS

No. 697,202

JAMES T. GALLICK, Plaintiff,

—vs.—

BALTIMORE & OHIO RAILROAD CO., Defendant.

DEFENDANT'S BILL OF EXCEPTIONS

APPEARANCES:

On behalf of the Plaintiff: A. H. Dudnik, Esq., Marshall L. Nurenberg, Esq.

On behalf of the Defendant: Baker, Hostetler & Patterson by Russell E. Leasure, Esq. and Alexander H. Hadden, Esq.

Alfonso Romito, Official Court Reporter, Cuyahoga County, Ohio.

[fol. 22] Thursday morning session, 9:15 A.M., June 11, 1959.

Plaintiff's Case

The Court: The Plaintiff may call his first witness.

Mr. Dudnik: Will you call William Molnar? If your Honor please, the Plaintiff calls Mr. Molnar for cross-examination under the statute.

Mr. Leasure: If your Honor please, the Defendant should like at this time to interpose an objection to any cross-examination until it has been established, until the foundation has been laid under the statute which we have discussed.

The Court: I ass me that counsel for the Plaintiff will establish the foundation.

You may proceed.

[fol. 23] Thereupon, the Plaintiff, to maintain the issues on his part to be maintained, called as a witness WILLIAM MOLNAR, who, being first duly sworn, was examined and testified as follows:

Direct examination of William Molnar.

By Mr. Dudnik:

Q. Mr. Molnar, I want you to speak loudly and clearly enough so that all of these folks can hear you. Will you state your name, please?

A. William Molnar.

Q. And where do you live, Mr. Molnar?

A. 7102 Elton.

Q. E-l-t-o-n?

A. Yes.

Q. Are you a family man, sir?

A. Yes, sir.

Q. Where do you work?

A. B & O Railroad.

Q. How long have you worked for the B & O Railroad?

A. It will be 14 years in August.

Q. And in what capacity do you work there?

A. As a brakeman.

Q. Is that also sometimes known as switchman?

A. Yes, sir.

[fol. 24] Q. Mr. Molnar, in August of 1954 were you working for the B & O Railroad?

A. Yes, sir.

Q. As a switchman?

A. Yes.

Q. In the month of August of 1954 what job were you working?

A. I was working 230 Seneca Street job.

Q. 230 Seneca Street job?

A. Yes.

Q. How long had you worked up to that time?

A. I had been on and off it for several years.

Q. On and off the job for several years. Now, will you explain to this jury and the Court what the 230 Seneca Street job is?

A. Well, you are switching the freight house and all the firms on the west side of the river.

Q. How is that done, briefly, Mr. Molnar?

A. Well, when the freight house is closed at night, you take the loads and empties out. Take the loads out, classify them, and then put the empties in for the next morning shift to load them up.

Q. Now, this particular Seneca job, this 230 Seneca job, does that involve the area around the flats and around the Cuyahoga River?

A. All the way down.

[fol. 25] Q. Beg pardon?

A. All the way down.

Q. Are you familiar with the Columbus Road bridge?

A. We go under it every day.

Q. You go under it every day on the 230 Seneca job?

A. Yes, sir.

Q. Mr. Molnar, when you say you go under it, do you sometimes ride under it?

A. Well, you are always riding on the engine.

Q. And have you ever walked under it?

A. Oh, yes, I have walked under it.

Q. And is that many times?

A. Well, when they tie the train up you have to walk under it.

Q. In other words, is it fair to state that in the course of your work, and in the course of doing your work on the 230 Seneca job, you have occasion often to ride and walk under the Columbus Road bridge?

A. Yes.

Q. Do you know Jim Gallick, Mr. Molnar?

A. Yes, sir.

Q. How long have you known him?

A. Well, from the time, from 1945 when I hired out.

Q. And had you worked the Seneca job with him?

A. Yes, sir.

[fol. 26] Q. On many occasions?

A. Well, he was on the job just prior to this accident.

Q. Were you working that job prior to the accident, too?

A. Yes, sir.

Q. By the way, can you tell us whether there are any men doing the type of work you are doing for the Baltimore and Ohio Railroad that are seventy years old or older?

A. Yes, sir. I don't know just exactly their age. I know they are up there quite a bit.

Q. And do you know that they are in their seventies?

A. I imagine he is, because I have heard it, it is just rumor. I wouldn't swear to his birthday.

Mr. Hadden: Your Honor, objection.

The Court: Sustained. "Just rumors" will go out.

Q. What you imagine and what is rumor we can't talk about. Now, do you know whether there are men working on that job that are about seventy years old?

A. I imagine he is about seventy.

The Court: The last answer will go out, and the jury will disregard it.

Q. You say you imagine, that isn't proper, but that is all right. Now, what kind of a worker was Jim Gallick before he had his accident?

A. Well, he was a hustler.

[fol. 27] Q. What do you mean by a hustler?

A. Well, hurry up and get our work done. Not go real slow.

Q. Was he a good worker?

A. Good worker.

Q. Was he a steady worker as far as you know?

A. Yes, sir.

Q. Mr. Molnar, this switching job on the Seneca Street job is the switching crew composed of four men?

A. Well, at that time I think there was only three.

Q. What would they be, all brakemen or switchmen?

A. Well, there was one conductor and two brakemen.

Q. Who gets the title of conductor?

A. The foreman. In the yard there they are known as foreman, on the road they are known as a conductor.

Q. And is the oldest switchman on that job, does he get the job of conductor, or foreman?

A. If he bids it in.

Q. If he bids it in, if he asks for it?

A. But if there is no one else, then the oldest man gets it.

Q. And besides the three brakemen that you had at that time, was there an engineer and a fireman who were part of it?

A. Yes, standard crew.

Q. So the standard crew was either five or six men, is that correct, sir?

A. Yes, sir.

[fol. 28] Mr. Dudnik: Your Honor, at this time I call Mr. Molnar for cross-examination under the statute.

Mr. Hadden: Your Honor, I should still like to register the same objection.

The Court: Objection overruled.

Mr. Hadden: Your Honor, may I be heard on that point?

The Court: Yes, you may.

OBJECTION TO CALLING MR. MOLNAR FOR CROSS-EXAMINATION BY MR. DUDNIK AND PROCEEDINGS THEREON AND OBJECTION OVERRULED

(Thereupon the following proceedings occurred at the Court's bench, outside the hearing of the jury, as follows:)

Mr. Hadden: Under the statute which you so kindly found for me this morning, Section 2317.52, as I read that

statute it permits the calling of an employee witness upon cross-examination only when it is established or admitted that the Defendant acted in whole or in part through the agent or employee in connection with the transaction on which he is called to testify.

Now, I do not think that has been established here. It has merely been shown that he is a company employee. This man is going to be cross-examined I presume on the conditions under the bridge.

He had no responsibility on that whatsoever. He was [fol. 29] merely a train employee.

If Mr. Dudnik wants to call him on some other subject matter, he certainly may.

The Court: Well, as I understand it, he has testified that a good part or some of his work at least takes him in that area under the Columbus Road bridge, and that he is a brakeman, and that he worked in the crew that Mr. Gallick worked in, and I think all that counsel for plaintiff will have to show is that this witness in the scope of his employment did a similar type of work that the plaintiff did.

That is the way I read it, but I may be wrong—

Mr. Dudnik: There isn't any question about it, your Honor. He is part of the entire transaction. He is part of the operation of the railroad. He is part of the case.

Mr. Hadden: He has nothing to do with the accident.

Mr. Leasure: In our opinion, Judge, the statute I think very clearly contemplates that the employee or agent shall be cross-examined only where he has played a part in the accident or other event that is the subject of a lawsuit.

That has not been established here at all, and I don't [fol. 30] think will be established in the case of this witness.

The typical example being a truck driver who is engaged in an accident which leads to a lawsuit. He can be called for cross-examination because the employer acted through him in the transaction that led to the lawsuit.

The Court: I don't read it that way, but let's read the Section:

"When the action or proceeding relates to a transaction or occurrence in which it has been shown or it is admitted that the adverse party acted either in whole or in part

through an agent or employee." I think there is no question about that, is there?

Mr. Leasure: He is an employee, but it relates to an occurrence, a particular occurrence.

Mr. Dudnik: It does not.

The Court: I am going to get to that. "Such agent or employee of the adverse party may be called"—he is an agent of the adverse party—

Mr. Leasure: But he is not such agent. He is not such agent.

[fol. 31] Mr. Hadden: He is not an agent through whom the B & O acted in connection with this transaction.

Mr. Leasure: Or occurrence.

The Court: I haven't come to that part yet.

Mr. Leasure: Go ahead. I didn't want to interrupt.

The Court: I will start reading from the beginning again:

"When the action or proceeding relates to a transaction or occurrence in which it has been shown or it is admitted that the adverse party acted either in whole or in part through an agent or employee, such agent or employee of the adverse party may be called as a witness and examined as if under cross-examination upon any matters at issue between the parties which are shown or admitted to have been within the scope of such agent's or employee's authority or employment.

"The party calling for such examination shall not thereby be concluded but may rebut such agent's or employee's testimony by counter-testimony.

"The party whose agent or employee is called as a witness by the adverse party and whose agent or employee is [fol. 32] examined as if under cross-examination shall not thereby be concluded but may rebut such agent's or employee's testimony by counter-testimony."

Now, you may rebut this testimony.

Mr. Leasure: We are not arguing about the latter part of this section, but it is the first paragraph.

The Court: I don't think there is any question in my mind that he may testify.

Mr. Leasure: On cross-examination?

The Court: Yes.

Mr. Leasure: Even though there is no showing that the employer acted through this man in the occurrence that is the subject of this lawsuit?

The Court: I don't think it says that here.

Mr. Leasure: Then much of the language is meaningless.

Mr. Dudnik: There isn't any question but what this man can testify. He is an employee. He is a part of this entire transaction. He is a part of the whole operation.

The Court: That is the way I read it, gentlemen. The objection will be overruled.

(Thereupon proceedings were resumed within the hearing [fol. 33] of the jury, as follows:)

The Court: The objection will be overruled.

Mr. Dudnik: Objection overruled, your Honor?

The Court: Yes.

Cross-examination of William Molnar.

By Mr. Dudnik:

Q. You recall, do you not, that Mr. Gallick had an accident underneath the Columbus Road bridge some time in August of 1954?

A. Well, that's when I first heard about it.

Q. You did hear about it, did you not?

A. I just heard about it.

Q. Now, do you recall a swamp or a ditch which ran alongside of the rail under the Columbus Road bridge?

A. Yes, sir.

Q. Is it not a fact that the swamp was there as long as you can remember?

A. Yes.

Q. Is it not a fact that on occasions before August of 1954 you saw dead pigeons and rats in that swamp?

A. Yes.

Q. Is it not a fact that you saw them constantly, sir?

A. Yes.

[fol. 34] Q. Is it not a fact that you saw them in good weather and bad?

A. Yes.

Q. Is it not a fact that although you never counted the pigeons in that swamp, there were several in there all the time?

A. Yes.

Q. And dead rats, sir?

A. Yes.

Mr. Dudnik: Mark this.

(Plaintiff's Exhibit 1, a large photograph, was marked for identification by the reporter.)

Mr. Dudnik: Mark this next, and this next.

(Plaintiff's Exhibits 2, 3 and 4, being large photographs, were marked for identification by the reporter.)

Q. Is it not a fact, Mr. Molnar, that when those rats and pigeons, the dead rats and pigeons, were lying in that ditch, there were bugs and insects around them, is that not a fact, sir?

A. There is always bugs where the stagnant water was.

Q. Were they there when the rats were there and the dead pigeons were there, Mr. Molnar, is that not a fact?

A. Yes.

Q. Now, Mr. Molnar, I hand you what has been marked for identification as Plaintiff's Exhibit 1, and I ask you to look at that. Do you identify this scene, sir?

[fol. 35]

A. That is under the Columbus Road bridge.

Q. That is the ditch we are talking about, isn't it, sir?

A. Yes.

Q. That is what you referred to when you answered my questions, is it not, sir?

A. Yes.

Offer in Evidence

Mr. Dudnik: I offer this in evidence, your Honor. This was taken on August 6, 1957.

The Court: Without objection, it will be received.

Q. Now, Mr. Molnar, I hand you Plaintiff's Exhibit Number 2, a photograph taken in August of 1957; do you identify this scene, sir?

A. That's under the Columbus Road bridge.

Mr. Dudnik: I offer this in evidence, if the Court please.
The Court: Without objection it will be received.
Mr. Leasure: Was that taken on the same date?
Mr. Dudnik: Yes, August 6, 1957.

Q. Now, sir, I hand you a photograph taken on August 6, 1957, marked for identification as Plaintiff's Exhibit [fol. 36] Number 3, and ask you if you can identify this scene, sir?
A. That's under the Columbus Road bridge.
Q. The same ditch, is it not, sir?
A. Yes, sir.

Mr. Dudnik: I offer this in evidence, if the Court please.
The Court: Without objection, it will be received.

Q. Now, Mr. Molnar, I hand you what has been marked for identification as Plaintiff's Exhibit Number 4, a photograph taken August 6, 1957, and ask you whether you recognize this scene?
A. That's under the Columbus Road bridge there. The High Level bridge.

Mr. Leasure: May we see that? We haven't seen that.
Mr. Dudnik: I am sorry.

Q. Mr. Molnar, we are looking through and under the bridge in a northerly direction, are we not?
A. Yes, sir.
Q. So that this ditch that we speak of was on the easterly, along the easterly rail?
A. Yes.
Q. Isn't it a fact that when these pigeons would die in that ditch, they would lay there and remain there for weeks [fol. 37] at a time, sir?
A. Yes, sir.
Q. And the men would work around there, sir?
A. Yes, sir.
Q. Is it not a fact, Mr. Molnar, that you yourself had an experience with a bug under that bridge within a couple of weeks after Jim Gallick's accident?
A. Yes, sir.

. . . . . .

[fol. 40] A. Yes.

Q. Is it not a fact, sir, that while going under the bridge you felt something crawling on your neck and you brushed it, is that a fact?

A. Yes, sir.

Q. Just brushed it from your neck off the left side, sir, is that not a fact?

A. Yes, sir.

Q. A couple of minutes later you felt it on your right side, did you not, sir?

A. Yes, sir.

Q. And you put your hand there and you felt something grab your thumb, didn't you, sir?

A. Yes, sir.

Q. And it was underneath the Columbus Avenue bridge, was is not, sir?

A. Yes, sir.

Q. And then you stopped to look for it, did you not, sir?

A. Yes, sir.

Q. Because you knew of Gallick's condition, isn't that a [fol. 41] fact, sir?

A. Well, I wanted to find out what was crawling on my neck. I didn't know what it was that grabbed my thumb, and I wanted to make sure what it was.

Q. But you didn't find it?

A. We couldn't find it. We hunted for about ten minutes.

Q. Now, handing you Plaintiff's Exhibit 1, sir, do you observe this wooden piling?

A. Yes, sir.

Q. Underneath the bridge?

A. Yes.

Q. And it forms sort of a dam, four-sided dam, does it not, sir?

A. Yes.

Q. And when the water gets in there, it cannot seep out, can it?

A. No, sir.

Q. And it remains there?

A. Yes, sir.

Mr. Dudnik: No further questions. Thank you, Mr. Molnar. You may step down and would you have the man stamp your subpoena, sir.

Call Mr. Rady.

Mr. Leasure: So there is no misunderstanding, is it the [fol. 42] Court's ruling that we cannot ask this witness any questions at this time, that we cannot cross-examine him, or ask him any other questions on any basis at this time?

The Court: Just a minute. Are you making a request now to ask—

Mr. Leasure: I am asking the Court for information as to what the procedure is. We raised our objection to procedure so far. The witness has just been summarily excused, and I am asking the Court what the procedure is from here on.

Mr. Dudnik: If I may be heard, your Honor?

The Court: Surely.

Mr. Dudnik: I do no wish to give the Court advice, but the procedure as I understand it is that they may call the witness as part of their case, as their witness, any time they put their case on. That is the procedure.

The Court: There is no question about that. Counsel for the defense has a right to recall this witness as his witness.

(Thereupon counsel and the Court conferred at the bench outside the hearing of the jury.)

The Court: Any request to cross-examine this witness on [fol. 43] the part of the defense will be denied.

Mr. Dudnik: Mr. Molnar, you may leave, sir.

[fol. 44] Thereupon, the Plaintiff, further to maintain the issues on his part to be maintained, called as a witness Walter Rady, who, having been first duly sworn, was examined and testified as follows:

Direct examination of Walter Rady.

By Mr. Dudnik:

Q. Will you state your name in full, sir
A. Walter Rady.
Q. R-a-d-y?
A. R-a-d-y.

Q. Mr. Rady, may I impose on you to speak loudly enough so these folks can hear you.

The Court: Ready?

A. Rady.

Q. Where do you live, Mr. Rady?

A. 11125 Glenboro.

Q. What do you do, Mr. Rady?

A. I am yard brakeman and foreman for the Baltimore and Ohio Railroad.

Q. How long have you been with them, sir?

A. I have been there 39 years.

Q. 39 years. Did you ever work the downtown Seneca job?

A. On relief, Saturday and Sunday, yes.

Q. And did you work the downtown Seneca job in 1954?

[fol. 45] A. Yes, sir.

Q. In August of 1954?

A. Yes.

Q. That is the job that services the flats and Cuyahoga River area?

A. Yes.

Q. In what capacity did you work, sir?

A. I was the yard foreman.

Q. Yard foreman?

A. Yard foreman.

Q. A foreman is a member of the switching crew, is he not?

A. That's right.

Q. Also known as a brakeman?

A. That's right.

Q. Does the man with the seniority get the foreman's job?

A. Well, not necessarily. It all depends whether he bids it in. But I just happened to bid it in.

Q. Does it pay a little more, higher rate?

A. It pays more, yes.

Q. Mr. Rady, do you know Jim Gallick?

A. Yes, I do.

Q. You have known him for a long time?

A. Yes.

Q. You have worked with him, have you not?

A. Yes.

[fol. 46] Q. Good workman, wasn't he?

A. That's right.

Q. Hard worker?

A. Yes.

Q. As far as you know, did he work steadily?

A. Yes, sir.

Q. Mr. Rady, in connection with your work on the Seneca job, did you have occasion on the days that you worked the Seneca job to be underneath the Columbus Road bridge?

A. Yes.

Q. And that is a daily occurrence, is it not, when you are working that job?

A. That's right,

Q. Is it not a fact, Mr. Rady, that you knew that there existed a pool of stagnant water underneath the Columbus Road bridge, is that not a fact?

Mr. Hadden: Your Honor—

A. Yes.

Mr. Hadden: May I preserve our objection?

The Court: The same objection.

Mr. Hadden: In the future?

The Court: Yes. The objection is overruled and the witness may answer.

A. Yes.

[fol. 47] Mr. Dudnik: May the record show I am calling him for cross-examination; your Honor.

Cross examination of Walter Rady.

By Mr. Dudnik:

Q. That is a fact, is it not?

A. Yes, sir.

Q. Is it not a fact that this pool of water ran near to the railroad as it passed under the bridge, and there was always a lot of pigeons that drank of this pool, and a lot of dead ones laying about, is that not a fact, sir?

A. Yes.

Q. Is it not a fact, sir, that this condition which I described in my last question existed in August of '54, and before that?

A. Yes.

Q. And for a long time before that?

A. Yes.

Q. Isn't that a fact, Mr. Rady?

A. Yes.

Q. And in that depressed area there was accumulated dead birds, pigeons, rats, and other vermin, is that not a fact, sir?

A. There were, yes.

Q. And is this not a fact, Mr. Rady, that most of the accumulation was prevalent under that bridge, isn't that a fact, sir?

[fol. 48] A. Well, may I say something?

Q. You certainly may, sir.

A. I would see pigeons at the bridge, on the Carter Road bridge.

Q. That is the bridge which the B & O runs under a little farther up the road?

A. Yes.

Q. Now, my question is, is it not a fact that the condition under the Columbus Road bridge was most prevalent?

The Court: Do you understand the question, Mr. Rady?

A. I understand the question. The only thing here: I could express myself better in my own way.

Q. I will let you do it, Mr. Rady.

The Court: You are advised to answer.

Q. Can you answer the question that I asked you, and I am going to have it read back to you.

A. All right.

(Following question was read by the reporter:)

"Now, my question is, is it not a fact that the condition under the Columbus Road bridge was most prevalent?"

A. Well, as far as pigeons and vermin, or whatever you have, you would see them in, under the Columbus Road [fol. 49] bridge and under the Carter Road bridge.

Q. Is that the two places you saw them the most?

A. Yes, that's where I saw them the most.

Mr. Dudnik: No further questions. You may go and have the gentleman stamp your subpoena.

Mr. Leasure: May we have the same ruling on this witness as the previous one, your Honor?

The Court: You are making the same request?

Mr. Leasure: Let's make it clear for the record. We wish to retain our objection to permission for the plaintiff to cross-examine these witnesses without establishing the proper foundation under the statute. We are objecting to our inability to cross-examine these witnesses.

Mr. Dudnik: I ask that the jury be instructed to disregard that statement, your Honor, because this was discussed in your presence and was ruled on by you, and he made the same statement in your presence, your Honor, and I ask that the jury be requested to disregard that statement of counsel.

Mr. Leasure: If your Honor please, that is the only way I can keep the record clear as to this witness.

[fol. 50] The Court: The jury is entitled to hear what Mr. Leasure said, and the objection raised by Mr. Leasure, or the request made by Mr. Leasure, however, is denied. You may step down.

Mr. Dudnik: This gentleman will stamp your subpoena.

[fol. 51] Thereupon, the Plaintiff, further to maintain the issues on his part to be maintained, called as a witness William Clason, who, being first duly sworn, was examined and testified as follows:

Direct examination of William Clason.

By Mr. Dudnik:

Q. Mr. Clason, will you give us your name in full, please?
A. William Clason.
Q. Will you spell your last name?
A. C-l-a-s-o-n.
Q. Where do you live?
A. 10918 St. Mark Avenue.
Q. What do you do, Mr. Clason?

A. I am yard foreman for the Baltimore and Ohio Railroad.

Q. Are you here pursuant to a subpoena?

A. Yes, I am.

Q. How long have you been with the Baltimore and Ohio?

A. Fourteen years, the 28th of next month.

Q. Mr. Clason, do you know any men who work on the B & O on the same jobs that you do that are seventy years of age?

A. Well, I really don't know their age. I only know one man that may be seventy.

. . . . . .

[fol. 52] Q. You only know what?

A. I only know one man that may be seventy. I don't know his age.

The Court: The last part of the answer may go out, and the jury will disregard the last part of the answer.

Q. Do you know Mr. English, Pat English?

A. Oh, Pat English? Oh, yes.

Q. How old is Pat English?

Mr. Hadden: Your Honor, let's establish who Pat English is.

Q. What does Pat English do?

A. He is retired right now. He was an engineer.

Q. Did he work on the Seneca Street job?

A. Oh, yes.

Q. How old was he when he retired?

. . . . . .

Q. Had you worked with Jim Gallick in the past?

A. Oh, yes.

Q. On the Seneca job?

[fol. 53] A. Yes.

Q. Did you know him then?

A. Oh, yes.

Q. Was he a good worker?

A. Yes.

Q. Mr. Clason, are you familiar with the bridge, the Columbus Road bridge?

A. Yes.

Q. Have you walked under it many times during your work?

A. Yes.

Q. And is it practically a daily routine?

• • • • • • •

[fol. 54] Cross examination of William Clason.

By Mr. Dudnik:

Q. Is it not a fact, Mr. Clason, that you first learned of Jim Gallick's accident within a couple weeks after it happened, and you learned it from a claim agent of the B & O Railroad?

A. Yes, I learned it from a claim agent of the B & O Railroad, but I am not certain about the couple of weeks afterwards. It may have been, it seems, it may have been longer than that.

Q. What is your best judgment as to when it was that you learned of Jim Gallick's accident?

A. Well, I would say possibly within a couple months.

Q. Within a couple months. But you can't tell us whether it was within two weeks, or within two months, or how close?

A. No, I can't remember.

Q. Your outside guess is two months?

A. It has been too long ago. I don't recall.

Q. Is it fair to state, then, that you learned of Jim Gallick's accident within two months after it happened, and you learned of it from a claim agent of the B & O Railroad?

A. Yes.

Q. Is it not a fact, sir, that back in August of 1954 you [fol. 55] were working what is called the downtown area job?

A. Yes.

Q. To refresh your recollection, sir, did you not tell me or somebody from my office that after Jim was gone for about two weeks a claim agent for the railroad came over—

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[fol. 56] Q. To refresh your recollection, Mr. Clason, did you not tell someone from my office in writing that after Jim Gallick was gone for about two weeks, a claim agent for the railroad came over and said he wanted a statement from you?

[fol. 57] A. Yes, I gave that statement.

Q. Is it not a fact that along the east rail under the Columbus Road bridge there is a depressed and lowered area, as a result of which there is a swamp there, is that not a fact?

A. Yes.

Q. Is it not a fact that there always was about a foot of water or more there, even in good weather, and during the rainy weather it was much worse, is that not a fact?

A. Well, a foot may be pretty deep but there has always been water there.

Q. Give me your best judgment if a foot is pretty deep?

A. Well, I would say an average of two or three inches all the time.

Q. Would you say that rather than the foot which you stated in the statement?

A. Yes, I would.

Q. Is it not a fact that it was there during good weather and bad?

A. Yes, it was.

Q. Is it not a fact that Paul Delaria, the section foreman, had made several attempts to clear this swamp up but was never successful, is that not a fact?

A. Yes, he did work on it to drain it.

Q. Sir, please! Read the question. You can answer that, [fol. 58] if I have stated a fact to you you say yes, and if I haven't stated a fact to you you say no.

* * * * * * *

(Following question was read by the reporter:)

"Is it not a fact that Paul Delaria, the section foreman, had made several attempts to clear this swamp up but was never successful, is that not a fact?"

A. Yes.

[fol. 59] Q. Is this not a fact, that as a result of the condition that existed there, there were quite a bit of bugs, rats, insects, and dead rotty pigeons there, is that not a fact?

A. Yes.

Q. Is this not a fact, that the condition was bad several years ago, and was still bad in August of '54, sir?

A. Yes.

Mr. Dudnik: Thank you, sir. You may step down and have your subpoena stamped.

The Court: Do you want the record to show that you are making the same request?

Mr. Leasure: Yes, if your Honor please.

The Court: The request is denied. You may step down, sir.

[fol. 60] Thereupon, the Plaintiff, further to maintain the issues on his part to be maintained, called as a witness MARY GALLICK, who, being first duly sworn, was examined and testified as follows:

Direct examination of Mary Gallick.

By Mr. Dudnik:

Q. Mrs. Gallick, I am going to ask you to try and keep your voice up so that everybody can hear you. Is that fair enough?

A. Yes, sir.

Q. You are Mary Gallick?

A. Right.

Q. Spell your name, Mrs. Gallick.

A. G-a-l-l-i-c-k.

Q. Where do you live, Mrs. Gallick?

A. 4403 Dawnshire Drive, Parma.

The Court: What is the street?

A. 4403 Dawnshire Road.

The Court: Dawnshire?

The Witness: Dawnshire, D-a-w-n-s-h-i-r-e.

Q. How old are you, Mrs. Gallick?
A. I was 52 on the 8th day of June.
Q. 52?
A. Yes, sir.
Q. And you are the wife of Jim Gallick?
[fol. 61] A. Yes, sir.
Q. How long have you been married?
A. Since 1926.
Q. 33 years, approximately?
A. Yes, sir.
Q. What do you do, Mrs. Gallick?
A. Waitress.
Q. Where do you work?
A. Downtown in Gazelle's.
Q. Mrs. Gallick, I am going to ask you if for several years prior to August of 1954 you have ever observed any eruptions or skin blemishes of any kind on your husband?
A. Never.
Q. On any part of his body?
A. Never.
Q. Do you recall when he worked for the B & O?
A. Oh, yes.
Q. What did he do before that?
A. He was foreman for Hunkin Conkey Construction Company, labor foreman.
Q. How long did he do that, Mrs. Gallick?
A. 12, 13, 14 years perhaps.
Q. Was he a steady worker or not when he was with Hunkin-Conkey?
A. Oh, yes, he was.
[fol. 62] Q. Was he a steady worker up until August of 1954 when he worked for the Baltimore and Ohio Railroad?
A. Yes, sir.
Q. As far as you can recall, prior to August of 1954 what illnesses did Jim have?
A. Not any.
Q. Do you recall any accidents of any kind while he was working on the railroad before that?
A. Well, I believe one time he pulled a ligament jumping on or off a car, something like that. How it happened I don't know. At work, it happened at work.

Q. Do you recall whether he lost any time?

A. Yes, at one time he did. But it wasn't stated as an accident.

Q. I didn't hear you.

A. It was not stated as an accident.

Q. Do you know what the reason for that was?

A. That I couldn't—no, I wouldn't know.

Q. How long before August of '54 was that?

A. I can't be sure of the time.

Q. Was it within two or three years before?

A. It could have been around two years. I am not too sure.

Q. Was Jim laid up a long time with that?

A. No, not too long.

Q. Do you recall what his injury was?

[fol. 63] A. Just a pulled ligament I believe the doctor said.

Q. Mrs. Gallick, before that, or aside from those two incidents which you remember, do you recall any other injuries which Jim may have had in his past?

A. One time I believe he jumped, during work, he stepped off of a working car and he stepped into a hole or something and got hurt.

Q. Was he seriously injured in that accident?

A. He hurt his ankle.

Q. Did it keep him out of work long?

A. Not too long, no.

Q. Was it a matter of days?

A. That I can't answer that. It has been so long.

Q. Mrs. Gallick, I am going to ask you whether you recall a certain day in August 1954 when Jim came home and asked you to look at a part of his body, do you recall that?

A. Yes, I do.

Q. And was it in August of 1954?

A. Yes, sir.

Q. Can you give us a date or not?

A. No, I can't.

Q. Can you tell us what time of the day or night that happened?

A. That is when he came home at night. He came home from work.

Q. When you say at night, about what time?

[fol. 64] A. It was after 11:00.

Q. Were you home?

A. Yes, sir.

Q. Now, what did he ask you to look at, Mrs. Gallick?

A. He told me he was sick, that there was something on the back of his leg, it was stinging, a burning sting, and he wanted me to look at it.

Q. And did you look at it?

A. Yes, I did.

Q. Can you stand up and perhaps point on yourself about where he asked you to look, what part of his leg?

A. It was back in here.

Q. Now you are pointing, you have got your hand on the right leg. Was it the right or left?

A. It was on the left. You could see it there.

Q. You are sure of that?

A. Yes, sir.

Q. And did you look?

A. Yes, I did.

Q. Will you tell the jury and the Court exactly what you saw?

A. Well, there was a welt just like when you get a bite.

Q. What color was it?

A. It was pink.

Q. What was the size of it?

A. About the size of — about that size, on my nail. Do [fol. 65] you like that.

Q. Are you now saying about half a finger nail?

A. Yes, it.

Q. Did it cause you any concern when you saw it?

A. No.

Q. When did you next see it, Mrs. Gallick?

A. The next morning.

Q. Did you look at it again?

A. Yes, I did.

Q. What did you see the next morning?

A. Well, it began to get deeper in color, deeper in color.

Q. What kind of a color?

A. Pink. It was a deeper pink.

Q. Did it give you any concern?

A. No.

Q. Did Jim go to work?

A. Yes, he did.

Q. When did you next look at it?

A. At night when he came home.

Q. What did it look like that?

A. Well, it was getting a little redder, little pinker. It kept getting pinker.

Q. Did it give you any concern?

A. Not too much.

Q. Did there come a time when you saw it and you were [fol. 66] concerned about it?

A. Yes, sir.

Q. How long after the first time that you saw it?

A. About the fifth day.

Q. And when you saw it on the fifth day, tell the Court and jury what it looked like.

A. Well, it began to get larger and real pink, real deeper pink around, and it began to raise.

Q. Did Jim do anything about it that day?

A. Well, he would always wash it with soap and water.

Q. Did he do anything after you saw it as you described?

A. I said to go see a doctor.

Q. Did he see a doctor?

A. I just don't remember how soon after.

Q. I say did he go to see a doctor?

A. Yes, he did.

Q. And who was the doctor?

A. Dr. Jacob Heller.

Q. Did you continue to observe it after that?

A. Yes, sir.

Q. And did it change in size and color as you continued to observe it?

A. It kept getting larger and it kept burning. That's why he kept after me. It kept burning him.

Q. Mrs. Gallick, did there come a time that your husband [fol. 67] went to another doctor?

A. Yes. We were alarmed then because Dr. Heller, he had gone to Dr. Heller and Dr. Heller was going to put him in the hospital. Jim had never been sick, so he was afraid to go to the hospital.

Q. So what did you do?

A. So then a friend of ours suggested, in fact I inquired if he knew a doctor that he might recommend, because Jim didn't want to go to the hospital. He wanted another doctor's opinion. So he went to Dr. Victor Ippolito.

Q. Did you go with him?

A. Yes, I did.

Q. Now, on the day that you went to Dr. Ippolito, were you there when Dr. Ippolito looked at this?

A. Yes, sir.

Q. Will you tell us what it looked like then?

A. By that time it was about the size of a half a dollar and it had raised and it had been draining on the side, and it looked very ugly.

Q. Did Dr. Ippolito look at it?

A. Yes, he did.

Q. Did he upon looking at it the first time, and examining it, suggest anything?

A. Immediately. Dr. Ippolito said "Into the hospital for you."

Q. Beg pardon?

A. He said immediately as soon as he looked at it, examined it, he said, "Jim, you are going to the hospital."

Q. And did he go?

A. Well, there was no bed. He was going to put him in the hospital that day, but there was no bed at Marymount. So he had to wait until Saturday of that week.

Q. And did he put him in then?

A. Yes, he did.

Q. Mrs. Gallick, do you know whether or not Jim received any surgery while he was at the hospital?

A. Oh, yes.

Q. I will ask you, Mrs. Gallick, how long after he entered Marymount Hospital did he receive his first surgery?

A. I believe that very week, the first week.

Q. Were you there when he came out of surgery?

A. Oh, yes.

Q. Was he in surgery more than once?

A. Oh, yes.

Q. How often did you visit him?

A. Every day.

Q. And did you know when he went to surgery?

A. Yes, sir.

Q. How would you know?

A. The doctor informed me that he would be going to surgery, and I was there before he left, and when he got out of surgery.

[fol. 69] Q. Did you see Jim after all of these surgeries?

A. Yes, sir.

Q. Describe to the jury how he looked.

A. Sick, very sick.

Q. Were you able to talk to him?

A. No, because he was under medication.

Q. Now, do you know how long he was in Marymount Hospital the first time?

A. I don't remember if it was three months or two months, something along in there.

Q. Well, the record will show that it was from September 18th to January 4th. Is that about right?

A. Yes.

Q. Now, at about the time or close to January 4th, shortly before he was sent home, were you able to observe Jim's legs and body?

A. Yes, sir.

Q. Will you describe to the jury what you saw?

A. Well, they had operated on the left leg that was injured, and it was deep, and it was about this much in size (indicating), open, and then the donor—they used the right leg to take the skin off.

Mr. Dudnik: Can you folks hear?

A. They took the skin off the right leg to cover up the one, the bad leg that they had operated on. And it looked [fol. 70] like it was going to heal, but it hadn't. It had formed a scar tissue as the doctors called it, is what it was.

Q. Besides that mark that you described, were there any other marks at that time, in January of 1955?

A. No.

Q. Just the right leg where they took the skin?

A. Yes, sir. The left leg was injured.

Q. From the time that you first saw that little mark on Jim on the first day until the time he went into Marymount

Hospital, or until the time rather when he went to Dr. Ippolito, was there one or more than one eruption?

A. One, just that one.

Q. How long was he home when he left the hospital?

A. It seemed to me like about three months, something like that.

Q. Now, I gave you some wrong data, and I would like to correct it, gentlemen.

The records will show that he was in Marymount Hospital from September 18th to December 8th, and I said January 4th. It is December 8th of 1954, Mrs. Gallick.

A. Yes.

Q. Now, when he went home he was home about a month, was he not?

A. Yes, sir.

Q. Will you describe his condition during that month?

[fol. 71] A. He was very sick.

Q. In what way, Mrs. Gallick?

A. Well, he had those—he had the open wound that had to be dressed. It was very very painful.

Q. Who dressed them?

A. I dressed them.

Q. How did you dress it?

A. The doctor gave me instructions as to how to dress them.

Q. How often did you dress them?

A. Morning and night, and put theromyacin on, and it had to be changed.

Q. Did you take care of him constantly?

A. Constantly.

Q. Were you working then?

A. I was.

Q. Who took care of him when you were at work?

A. The neighbors looked in on him.

Q. Now, Mrs. Gallick, he went back to Marymount Hospital, as I said, he was home about a month, on January 4 of 1955, did he not?

A. Yes, sir.

Q. How long did he stay in the hospital the second time?

A. A year and a half or better.

Q. To refresh your recollection, it was about a year and [fol. 72] a quarter, about 15 months, Mrs. Gallick.

Did you see him at the hospital?

A. Every day.

Q. How long did you stay there?

A. I would stay with him about until quarter of three, because I was due at work at four o'clock.

Q. And did you observe him every day?

A. Every day.

Q. During that period how did he progress, was he getting better or worse?

A. He had very awful pains, horrible awful pains.

Q. How did you know that?

A. Because he cried most of the time. He kept grabbing for something to hold onto, with the pains. He couldn't pass his bed unless he would complain of horrible pains.

Q. As time went on during the second stay, were there any more eruptions on his body?

A. Yes. It went wild. It just broke out in different places.

Q. Tell us where it went?

A. His ankle went, which took the entire heel in practically.

Then the place—then the donor, the right leg, had gone, which had been the donor, that had gone.

Then I believe there was a place on his side or underneath his arm. I am not too sure of that, because they went so rapidly that you couldn't keep up with them.

[fol. 73] Q. Were they getting larger?

A. Oh, yes.

Mr. Dudnik: Mark these.

(Plaintiff's Exhibits 5, 6, 7, 8, 9 and 10, being photographs, were marked for identification by the reporter.)

Q. Mrs. Gallick, I am going to hand you a photograph that has been marked for identification as Plaintiff's Exhibit 10, and I ask you who is the man in this picture?

A. That is Jim and his nephew, his brother's son.

Q. Is that Jim Gallick?

A. Yes, it is.

Q. How long before 1954 was it taken?

A. About a year before.

Mr. Dudnik: I should like to pass this around to the jury at this time, your Honor.

The Court: You may.

OFFER IN EVIDENCE

Mr. Dudnik: Wait. Marshall reminded me, your Honor, that I have to offer it in evidence first.

May I offer it in evidence?

The Court: Without objection it will be received in evidence.

Ladies and gentlemen of the jury, at this time there will be a brief recess.

[fol. 74] You may return to the jury room once more with the admonition do not talk about this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

By Mr. Dudnik:

Q. Mrs. Gallick, I believe you told us he was in Marymount Hospital for some 15 months?

A. Approximately.

Q. And after that he came home, did he not?

A. Yes, he did.

Q. And he was home how long, do you recall?

A. I can't be too sure of the dates because

Q. Would this be right, according to the hospital records he was home from March 8th of 1956 until July 30th of 1956?

A. That is almost three and a half months.

Q. About four or five months, about five months, is that about right?

A. Yes. That would be about right, but I am not too sure on the time.

Q. Could you describe to the jury where he spent his time during that five months?

A. In bed.

Q. Could he go to the bathroom?

A. No, not at last, no, not when he came home that time, no.

Q. How many openings did he have that were sore? [fol. 75] A. At that time the left leg and the one that they used for the donor, his ankle—

(Interruption.)

Q. Will you hold up a little bit, please. Just hold up. Now keep your voice up.

A. There were so many you just can't remember.

Q. What was the appearance of the original one? What was the size of it at that time?

The Court: I am sorry, Mr. Dudnik. I was distracted myself. I think the question was—

Mr. Dudnik: How many openings were sore, and there were so many you just can't remember.

Q. My next question is:—Could you describe the size of the original one on the back of his left leg?

A. Well, I couldn't show you, only if I stood up.

Q. All right.

A. I will have to show you on my right leg. It extended from here to here and it covered all this in here. The doctors—

Q. How did it look?

A. Oh, it looked vicious. It was a big hole where you could see the tendons, as he had to elevate his foot, whatever way they could put it for him.

The tendons and the flesh would be just hanging through there.

Then when I would dress them the doctor instructed me [fol. 76] to take the gauze and the medication and I would pack that in folding the gauze and packing that in there.

Q. Into the opening?

A. Into the openings. They were draining.

Q. Were they draining?

A. Draining awful bad with a terrible odor.

Q. How often did you pack them?

A. Well, twice a day and sometimes if they drained more I had to dress them again, because they drained more.

Q. What happened when you took the packing off?

A. He would just scream with pain. And often times he would grab my arm in order to keep from hurting, he would ask me to step aside for a little bit until he could get his breath because it was so painful.

Q. Was that everytime you dressed him?

A. All the time, all the time.

Q. Who took care of him during those months that he was home?

A. The neighbors looked in on him. We had a nurse that lived in the back of us. She looked in on him maybe by the hours, came in.

Q. Who took care of him when you were not working, during the day when you weren't working who took care of him?

A. I took care of him always.

Q. Now, he then entered the Cleveland Clinic on July 30th, 1956?

[fol. 77] A. Yes, sir.

Q. Do you remember that?

A. I sure do remember it.

Q. And according to the Cleveland Clinic records he was there from July 30, 1956, to December 21, 1956?

A. That's right.

Q. How often did you see him?

A. Every day.

Q. How was Jim doing?

A. Very bad.

Q. He left the Clinic on December 21, 1956, and he was home until February 5, 1957; a period of about five weeks or six weeks.

Do you remember that period?

A. I sure do.

Q. What did you do for him?

A. I kept dressing him the way that I was instructed.

Q. And was that daily?

A. Every day, every morning and night.

Q. Were they still — were they running?

A. Running, running sores. Running. It was green and gray and all different horrible colors on it. And they were deep.

Q. Was there an odor to it?

A. Unbearable odor, but I didn't mind it.

Q. Now, he went back to the Clinic on February 5th, 1957, [fol. 78] and he stayed until April 13th of '57?

A. Y .

Q. About two and a half months. Why did he go back, do you know?

A. He got very bad. He was very bad.

Q. Now, during the first stay at the Clinic was he operated on?

A. On the first day? I can't remember if he did on the first day.

Q. Stay, not day. During the first entrance to the Clinic did they operate on him?

A. Oh, yes, they operated on him.

Q. How many times, do you know?

A. I don't know how many operations he had before the amputations. I don't remember. There were so many. I can't remember.

Q. Were you there all the time?

A. Always there.

Q. How did he look during that time?

A. Horrible, after each operation he looked worse.

Q. Then during the second stay at the Clinic between February 5th of '57 and April 13th of '57, was he operated on?

A. Yes, he was.

Q. Now, then, he went back to the Clinic on April 25th, 1957, and stayed until June 22nd of 1957, about two months, did he not?

A. Yes.

[fol. 79] Q. I am going to hand you five photographs, they are Plaintiff's Exhibits 5, 6, 7 and 8, and ask you to look at them and tell the jury whether Jim's body appeared or they correctly represent how Jim's body appeared while he was at the Cleveland Clinic?

A. Oh, yes.

Q. Look at all of them.

A. They got a lot worse than these.

The Court: Mr. Dudnik, I notice that you handed the witness five of them. You only mentioned four. You mentioned Plaintiff's Exhibits 5, 6, 7 and 8?

Mr. Dudnik: Yes.

A. They got worse than this.

Q. They got worse than this?

A. Much worse than this. They got a lot worse.

Mr. Dudnik: Plaintiff's Exhibits 6, 6, 7, 8 and 9. Thank you, your Honor.

Your Honor, at this time while I don't wish to pass these to the jury, I would like to hold them up and give them an opportunity to see them.

The Court: No objection, you may do so.

Mr. Dudnik: May the record show I offer them in evidence, your Honor. I think I overlooked it. May the [fol. 80] record show that they are offered?

The Court: Without objection, they may be accepted in evidence.

Q. What happened on May 21, 1957 do you recall?

A. I believe that is when the first leg was amputated, the left leg was amputated.

The Court: Mrs. Gallick, will you take your time. I know I wasn't able to hear you. Could you jurors hear that back there?

Q. Mrs. Gallick, speak slowly and loudly. Everyone has to hear what you say. Now I am going to ask the question again. What happened on May 21, 1957?

A. I believe that is when they amputated the first leg, the left leg.

Q. They amputated the first leg?

A. Yes, sir, the left leg.

Q. Describe how Sam was when he came out of surgery, after he got over the ether or whatever they gave him?

A. He was very bad.

Q. What were his spirits?

A. Well, naturally he was broke-hearted, because it went so fast. And it is not easy for anyone to take your leg.

Q. What happened on June 12, 1957?

A. Just a minute, just a minute.

[fol. 81] Q. Take your time.

A. I can't be sure of the dates. The dates are confusing, because they were all like a nightmare.

Q. Do you remember that as being the day that they took Jim's other leg off?

A. As I said, I am not sure on the date. What date was that?

Q. June 12th of 1957, is that about when they took Jim's other leg off?

A. I can't be sure of the dates, because it has all been a horrible nightmare.

Q. They did, however, within three weeks take Jim's other leg off, didn't they?

A. Yes.

Q. Were you there?

A. I sure was there.

Q. Can you tell us a little about him when he got out of surgery, the next day, the next week?

A. Well, he was very bad. He was very weak from it all, and then after when he had realized that his both legs were gone, I can't describe it. It was horrible.

Q. Now, Mrs. Gallick, he was at the Cleveland Clinic, following those amputations until July 21, 1957. Is that about right, if the record shows it?

A. I beg your pardon?

[fol. 82] Q. July 21, 1957, is that about right, that he was dismissed or that he left the Cleveland Clinic?

A. Yes.

Q. Did he go home from there?

A. '57 did you say?

Q. Yes, or did he go straight to Highland View Hospital?

A. He went to Highland View Hospital. He never came home again.

Mr. Leasure: Isn't that the wrong date?

Mr. Dudnik: No. July 21, 1957.

Q. Is that the date?

Mr. Leasure: That was '58.

A. '58, I am not—

Mr. Dudnik: Well, let's make sure. What is the discharge date there?

Mr. Leasure: July 21, 1958.

Q. Then he was there about a year after they amputated the leg?

A. Yes, he was.

Q. I am sorry.

The Court: Is that at the Cleveland Clinic until July 21st of '58?

Mr. Dudnik: Just a moment, your Honor. I am a little confused here.

Q. Was the surgery in '58? Was the surgery in '58?

[fol. 83] A. In '58.

Q. I am sorry.

A. The dates are all so confusing.

Q. They are confusing to me, too.

A. Because we lost track of the time.

Mr. Dudnik: In '58, your Honor.

The Court: Both of them in '58? The records, of course, will speak for themselves.

Mr. Dudnik: They will speak for themselves, your Honor.

The Court: But let's get it cleared up for the record.

Q. Do you remember what year?

A. In '58, yes.

Q. How long altogether was he at the Cleveland Clinic?

A. Mr. Dudnik, I can't be sure of the dates. I cannot be sure of the dates.

Q. However, from the Cleveland Clinic—

A. The doctors' records will have it all.

Q. Is it fair to state now that he was in the Cleveland Clinic for about two years with the exception of the two months or so that he came home?

A. That's correct.

Q. I am sorry I confused you, and myself, Mrs. Gallick.

[fol. 84] Where did he go from the Cleveland Clinic?

A. He went to Highland View Hospital and he has remained there since.

Q. Has he been home since?

A. No, he has not been home. He has been very bad.

Q. Mrs. Gallick, where is Highland View Hospital?

A. Out on Richmond Road.

Q. How often do you see Jim?
A. Every day.

Mr. Dudnik: I have no more questions.

Cross examination of Mary Gallick.

By Mr. Hadden:

Q. Mrs. Gallick, I want you to understand I don't want to make this any more difficult for you than necessary. If you would like to stop, please tell me. I only have one or two questions, and they relate to the time back in August of 1954, when Jim first came back to the house and described that he had been bitten, according to what your testimony has been.

A. Yes.

Q. I wonder if you could describe in somewhat more detail exactly what the appearance of the place he complained about was?

A. Well, I will have to show you on my right leg again. I will say—

[fol. 85] Q. I don't care where it was. I just want to know what it looked like.

A. What it looked like?

Q. Yes.

A. It was back in here. It was about half the size of my nail. And it was a welt like—like you would see a bite, and it was pink.

Q. It was all pink?

A. Around, you could see, then there was a little red thing in there. You could see it was a bite, you could see it was a sting.

Q. There was a little red what in it?

A. It was a welt with a little red thing. You could see that it was a sting.

The Court: Little red thing.

Q. Little red thing?

A. Yes. It looked like it might have been, but as you put your thumb on it, he asked me to touch it because it felt,

it still stung and hurt in that way. As I put my thumb on it, it was warm to my thumb.

Q. Now, the thing, can you describe the thing that you saw in it?

A. How could I describe a little red speck in there?

Q. A red speck?

A. Yes, it was.

Q. Is that the best you can do about describing it?

A. Yes. You could see, you knew it was a welt, it was a bite. You could see it because it was different from the other flesh.

Q. One or two more questions, Mrs. Gallick. Since August of 1954 when this first started, your husband as you testified has been in considerable pain, is that right?

A. The worst pain that any man ever lived through.

Q. If you will just answer my question we will be through a little quicker.

A. Yes.

Q. Is it fair to say, Mrs. Gallick, that the pain has varied, sometimes it has been worse and then it has gotten better for a time and then perhaps it has gotten worse, is that so?

A. No, it continued on. It continued on in a horrible pain.

Q. I am not saying that it stopped at any time. I merely

A. No, it never stopped, it never stopped.

Q. But was it worse at some times than at others?

A. I think Jim could answer that better for himself.

Q. You don't feel you can answer that, that is quite all right.

A. No, I can't answer for him.

Mr. Hadden: That is all. Thank you. You may step down.

Mr. Dudnik: We will call the Plaintiff.

[illegible] The co-partnership heretofore existing between James J. Gallick, plaintiff herein, and [illegible] for the purpose of carrying on business as [illegible] and for the settlement of the affairs of said co-partnership, and for the dissolution thereof, and for the appointment of a receiver of the assets of said co-partnership, and for the winding up of the business of said co-partnership, and for the distribution of the assets of said co-partnership among the parties entitled thereto, and for the payment of the debts of said co-partnership, and for the taking of an account of the moneys due to and from said co-partnership, and for the payment of the moneys due to and from said co-partnership, and for the payment of the moneys due to and from said co-partnership, and for the payment

A. (Witness nodded.)

Q. How far did you go in school, Jim?

A. 8th grade.

Q. Where?

A. Minneapolis.

Q. What did you do when you got out of school?

A. Oh, various jobs. I drove a

Q. Can you bring us up to date until the Hundred Cent job?

A. I worked in a grocery, delivering groceries and I drove a truck. I ran errands for the Great Northern

[fol. 89] Q. And then what?

A. Then I went, moved to Chicago.

Q. Hold it, Jim, we have got a little competition.

(Interruption.)

You say you moved to Chicago?

A. To Chicago [illegible]

Q. Office work?
A. No.
Q. Always with your hands and feet?
A. Hands and feet.
Q. Jim, when you left the Hunkin-Conkey where did you go to work?
A. Baltimore and Ohio Railroad.
Q. Approximately what year?
A. 1944.
Q. So that in '54 you had been there 10 years?
A. 10 years.
Q. What did you start as?
A. As a brakeman.
Q. And did you continue to be a brakeman up until 1954?
A. No. I was promoted to yard foreman shortly after I started.
Q. And were you a yard foreman in 1954?
A. I was not. I worked as both up until '54.
Q. You worked both?
A. Yes.
Q. Jim, what diseases of any kind or sicknesses did you have in your early childhood and your early youth?
A. None. All I remember, I had one, smallpox.
Q. Smallpox?
[fol. 91] A. Yes.
Q. How old were you then?
A. Well—
Q. When you were a baby?
A. No, when I was 10, 12 years old.
Q. Did you get over it?
A. Oh, yes.
Q. Did you ever have any kind of a skin condition?
A. I never as much had a pimple on me.
Q Did you ever have sugar diabetes?
A. Oh, no.
Q. Did you ever suffer from colitis?
A. I don't know what it is.
Q. Did you ever suffer from Buerger's Disease?
A. I don't know what that is.
Q. Did you ever have an allergy of any kind?
A. No.

Q. I take it then up until 1954 you were a man of good health?

A. Good health.

Q. What did you weigh in August of 1954?

A. 204 pounds.

Q. What do you weigh now?

A. 90. Go ahead.

Q. Can we go on, Jim?

A. Go ahead.

[fol. 92] Q. Did you ever have any serious accidents before August of 1954?

A. Sprained ankle.

Q. On the railroad?

A. On the railroad, and I guess a pulled ligament.

Q. Did you ever have a sprained back?

A. Yes, yes.

Q. Were any of those serious accidents, Jim?

A. None, no.

Q. Were any of them loss of time accidents?

A. No.

Q. Your wife was saying something. Would you explain what your wife said—

A. Yes, yes, there was one time an accident when I was working for the DuPonts. I got off a tank car and it was in kind of a hole that I stepped in, and I sprained my ankle and I broke a couple of toes.

Q. When was that, Jim?

A. Oh, that must have been about '51, '52 somewhere.

Q. Did you get over that all right?

A. Yes.

Q. Now, your wife said something about accidents and no accidents. I think you can explain what the railroad terms are for lost time accidents and no lost time accidents.

A. Well, when you don't lose no time, that is no lost time.

[fol. 93] Q. Are there times when you can't work for a few days after an accident they can let you mark in and off so not to make it a reportable accident?

A. They did me for 30 days.

Q. What is the reason for those things?

A. Well, I think mostly—

Mr. Leasure: I think we will object, your Honor. The jury doesn't know for sure. He has indicated that he thinks, and I don't think it is relevant here anyway.

The Court: Objection sustained.

Q. At any rate, none of the accidents you had were serious?

A. No.

Q. Jim, when did you start to work on the Seneca downtown job?

A. Oh, I would say around 1950.

Q. Now, from 1950 to 1954 was that your regular job?

A. That was my regular job.

Q. And what trick did you work most?

A. The second trick.

Q. And what is the time of the second trick?

A. 3:00 to 11:00.

Q. Jim, just tell us a little bit about that Seneca Street job.

The Court: Is that 3:00 p.m. to 11:00 p.m.?

[fol. 94] Mr. Dudnik: 3:00 p.m. to 11:00 p.m.

Q. Just tell us a little bit about the downtown Seneca job, sometimes called the downtown job?

A. Downtown.

Q. Sometimes the Seneca job, same thing?

A. Yes.

Q. What is the downtown Seneca job?

A. It refers to the freight house, to switch, you take—

Mr. Dudnik: Can all you folks hear? Thank you.

A. You take empties in and out of the freight, out of the firms, and you would place, you would pull the freight house and take the loads that were loaded cars out of the freight house, classify them, and take them to Clark Avenue.

Q. In other words, I take it there were cars along the industry, what do they call them, platform sidings?

A. Yes, and we have a yard there.

Q. And you move out the empties and pull in the full ones, that is a switching operation, isn't it?

A. That's right.

Q. And that job is mostly in what territory, of what part of town?

A. Well, it would be the flats.

Q. The flats?

[fol. 95] A. The flats.

Q. That is around the river, isn't it?

A. Yes, right alongside the river.

Q. Now, how many men work on one of those jobs or crews, one of those jobs? I will withdraw that.

That was a very very—not for a railroader—that must have been a silly question.

You have crews working together?

A. Yes.

Q. How many men in a crew?

A. Well, there would be the yard foreman and this particular job had three helpers.

Q. A yard foreman and three helpers?

A. And an engineer and a fireman.

Q. Now, we know the engineer runs the engine.

A. Right.

Q. The fireman sits next to him?

A. Yes.

Q. He stokes the fire?

A. Right.

Q. Now, the foreman, is he a switchman, too?

A. Yes, yes.

Q. What is the difference between a helper and a foreman?

A. Well, the foreman has the responsibility of the job, to run the job.

[fol. 96] Q. Now, three helpers, and they are switchmen?

A. They are switchmen.

Q. Do they sometimes work with the engine? I am talking about the four—

A. Yes.

Q. And do they sometimes work away from the engine?

A. Away.

Q. Are there times when the men ride the engine?

A. Right.

Q. Are there times that the men walk and the engine follows them?

A. Yes.

Q. Does that all depend on the kind of work you have to do?

A. That's right.

Q. Now, in August of 1954 on the day that you had your accident, what were you then, the helper or the foreman?

A. I was the yard foreman.

Q. You were the yard foreman?

A. Yes.

Q. Did you bid in that job?

A. No. The regular foreman was off.

Q. So you got it?

A. Yes.

Q. Does the foreman's job pay more than—does the foreman get more than the brakeman?

[fol. 97] A. It does.

Q. In '54 how much was a brakeman getting a day?

A. I think it was $17.54.

Q. And how much was the foreman getting?

A. $18 something.

Q. Have there been any increases in that rate since, do you know?

A. Oh, I think there has. I think there has been two increases.

Q. Since then?

A. Since then.

Q. Now, when you worked that trick, second trick, what time did you normally get down to work?

A. Around 2:00.

Q. And where did you go?

A. Well, you park your car, go to the yard office.

Q. And what is the operation from there?

A. You get to the yard office about quarter to 3:00, you would call Clark Avenue, get your orders as to consist of your work, and then proceed to the engine and go to work.

Q. Now, was this a daily routine?

A. That is daily.

Q. And the foreman called and got the orders?

A. Yes.

Q. Jim, of course you are familiar with the Columbus Road bridge?

[fol. 98] A. Right.

Q. Before 1954 on your Seneca Street job that you worked for four years, how often did you get to go under that bridge every day?

A. Every day.

Q. More than once a day?

A. Sometimes more than once a day.

Q. Did you sometimes walk underneath?

A. Yes, we would walk.

Q. And did you sometimes ride underneath?

A. And sometimes ride.

Q. Now, how many tracks do they have under that bridge?

A. One track. It is two rails.

Q. One track which is two rails?

A. Yes.

Q. And what was that track known as?

A. The River Track.

Q. Jim, that track runs in which direction?

A. North and south.

Q. Railroaders call that different.

A. East and west.

Q. In other words, railroad directions it is east and west?

A. East and west.

Q. But the way we folks look at it it is north and south?

A. North and south.

[fol. 99] Q. Jim, can you describe the condition underneath the bridge, particularly along the east rail as it was in August of 1954?

A. Well, there was stagnant water, dead rats, pigeons, with insects flying above and in the water.

Q. Were those rats and pigeons in the water?

A. In the water and along the rail.

Q. How long, if you know, had that condition which you now describe existed before August of 1954?

A. As long as I remember.

Q. Well, how long do you remember, Jim?

A. Well, the length of time that I worked for the B & O Railroad, 10 years.

Q. Was it ever cleaned up?

A. I have never seen it cleaned up.

The Court: I didn't hear that.

Mr. Dudnik: "I have never seen it cleaned up."

Q. Had you ever complained about it to anyone?

A. Yes, to Paul Delaria, the track foreman.

Q. To Paul Delaria, and he is what?

A. He is the track foreman.

Q. Had you complained about that before August of 1954?

A. Yes, a long time before.

Q. Had you complained about it once or more than once?

A. More than once.

[fol. 100] Q. Jim, I am going to hand you a photograph which has been marked Plaintiff's Exhibit No. 2, taken two years after your accident, and ask you if it correctly represents the appearance of the condition you described underneath the Columbus bridge on the day that you had your accident?

A. Except for the dead rats and pigeons. I don't see no insects.

Q. You say except for the dead rats and the pigeons and insects?

A. And insects.

Q. Except for that, is that the way it looked?

A. That way and much worse.

Q. That is Plaintiff's Exhibit No. 2. Do you say the same or not for Plaintiff's Exhibit No. 1 taken in August of 1957?

A. I would say the same.

Q. By the way, this Plaintiff's Exhibit No. 1, Jim, is this top rail the east or west rail?

A. That is the east rail.

Q. In other words, is north in this direction, north in this direction?

A. North would be along going along the track.

Q. I see. But that is the east rail?

A. Yes.

Q. Perhaps you can tell me better about Plaintiff's Exhibit No. 4 which is a picture taken in August of 1957, [fol. 101] three years after your accident.

Now, in this picture which way are you looking as you look into the picture?

A. North.

Q. That makes the east rail the one on the right, isn't it?

A. That's right.

Q. Now, do you remember the day you had your accident?

A. I do.

Q. Can you tell us the date now, the exact date?

A. No, I can't say the date.

Q. On that day, Jim, when did you leave home?

A. As usual, at 2:00.

Q. How did you feel that day?

A. I felt good that day.

Q. What was your state of health?

A. Very good.

Q. When you got to work—did you drive to work?

A. I drove to work.

Q. You parked your car?

A. Parked my car.

Q. Do you recall about what time you got into the yard office, is that what you call it?

A. Around 2:00.

Q. That gave you how much time before you started?

A. An hour.

[fol. 102] Q. Why did you get there so early?

A. Well, it was nothing unusual for me. I always got a job ahead of time.

Q. And did you call for orders?

A. About a quarter to 3:00 I called for orders.

Q. And did you get them?

A. I got my orders.

Q. What is the first thing you did, Jim?

A. The first thing, we picked up our lunches and lanterns, went to the Diesel, put them on the Diesel, and went over to the spur yard.

Q. All right. Now, where was the Diesel with relation to the office?

A. Directly across from the yard office.

Q. And you say you put your things in the Diesel and went to the spur track?

A. Spur yard.

Q. Spur yard?

A. Yard.

Q. Was that at another track?

A. Yes, that was another track.

Q. Did you walk there or ride the engine there?

A. No, I walked there.

Q. What did the other men do, if you recall?

A. The head man took the engine up to the switch, threw [fol. 103] the switch for the Diesel to back down into the spur yard in track 7.

Q. Now, Jim, do you remember the engineer on that day?

A. Pat English.

Q. Do you know how old Pat is or was then, if you know? If you don't know, it is all right.

A. He was over 65.

Q. Who was the fireman?

A. That I don't know, because he was called, I think he was called on the earlier shift, on the morning shift.

Q. Now, can you not tell us the name?

A. No, I can't.

Q. Can you tell us the other three members of your switching crew?

A. No, I don't remember either, for the simple reason we were—they was men that was called for the locals, which left me the foreman, and that's the reason I don't remember.

Q. In other words, you cannot recall who was with you that day?

A. No, I don't.

Q. Now, after you went to the spur yard what did you do then?

A. Well, there was a couple of cars on the head end of track 7, and we coupled onto them and shoved them to the rear of track 7.

Q. Jim, I am not going to bother you with that airplane [fol. 104] picture. Where was this operation with relation to the Columbus Road bridge?

A. Well, it was underneath it.

Q. Underneath it?

A. Underneath it.

Q. You did some switching underneath, I mean, movements underneath the bridge?

A. Yes.

Q. Then did there come a time when you left your engine and started to walk under the bridge?

A. Yes.

Q. And this mishap which you are going to tell us about, this accident that you are going to tell us about, did it happen on your first walk through under that bridge?

A. The first walk.

Mr. Dudnik: Your Honor, this is as good a time as any to recess.

The Court: Ladies and gentlemen of the jury, we will recess now for the luncheon hour, and because of some duties the Court has to perform, we will recess until 2:00. You will have your lunch and return for action at 2:00. You may retire to the jury room once more with the admonition that you do not talk to anyone about this case, [fol. 105] not even amongst yourselves.

(Thereupon an adjournment was taken to 2:00 o'clock, p.m., June 11, 1959, at which time the following proceedings were had:)

[fol. 106]

Thursday afternoon session, 2:00 p.m., June 11, 1959

Thereupon the Plaintiff, JAMES T. GALLICK, resumed the witness stand and was further examined and testified as follows:

Direct examination of James T. Gallick, resumed.

By Mr. Dudnik:

Mr. Dudnik: Mr. Romito, will you read the last two questions and answers?

(Last two questions and answers were read by the reporter.)

Q. Jim, I want to straighten one thing out. You told the jury you had smallpox when you were a child, and I asked

you about that during the luncheon intermission; was it smallpox?

A. Chicken pox.

Q. Chicken pox?

A. Yes.

Q. Are you sure of that?

A. Yes.

Q. Jim, when you started for the bridge where had you come from?

A. The spur yard over Lime Road.

Q. Over Lime Road?

A. Yes.

Q. Onto where?

[fol. 107] A. Onto the River Track.

Q. Onto the River Track, that is the track that you told us that leads under the bridge?

A. Under the bridge.

Q. And did you start from that point for the bridge?

A. Yes.

Q. How far were you when you got off of Lime Road and onto the River Track, how far were you from the entrance to the bridge?

A. About 20 or 30 feet.

Q. 20 or 30 feet, and would you then be going in which direction as you go toward the bridge?

A. North.

Q. Would you then be going in the direction that you see looking at Plaintiff's Exhibit 4?

A. Yes.

Q. And at that time I take it you were on the River Track?

A. The River Track.

Q. Did you then start for the bridge?

A. Yes.

Q. Did you stop at any point under that bridge or did you go all the way through without stopping?

A. No, I stopped under the bridge.

Q. What was the purpose of your stopping?

A. To see where the engine was, where the Diesel was coming down.

[fol. 108] Q. When you went in first, as you enter the bridge didn't you know where the Diesel was?

A. No.

Q. Did you know where it was going to be later?

A. Well, I knew, I had an idea where it was going.

Q. Now, then, you say then you stopped to see where it was?

A. Where it was, yes.

Q. Where were you in that bridge or under that bridge when you stopped, in other words, were you closer to the entrance, closer to the other side, or closer to the middle?

A. I would say closer to the middle.

Q. To the middle?

A. To the middle.

Q. When you stopped where were you standing with reference to that ditch?

A. Alongside the track, that would be the west track of the River Track.

Q. You were not alongside the rail closest to the ditch, were you?

A. No.

Q. You were on the other side?

A. On the other side.

Q. And when you stopped, as you stopped which way were you headed?

[fol. 109] A. Repeat that.

Q. As you stopped which way were you headed?

A. South.

Q. Well, before you headed south were you headed north?

A. Yes. When I stopped underneath the bridge I looked to see where the Diesel was coming.

Q. Before you looked which way were you headed?

A. North.

Q. And what did you do in order to look?

A. Well, I had to turn around.

Q. And when you turned around then were you headed south?

A. Yes, then I was looking south.

Q. How long did you stand there before you determined the position of your Diesel?

A. Oh, about 30, 45 seconds maybe.

Q. Is that your best judgment?
A. That's my best judgment.
Q. Then after you determined where it was what did you do?
A. Then I proceeded, I started to walk.
Q. Now, when you started to walk, tell the Court and jury what happened?
A. I was bitten after I took a few, a couple of steps.
Q. You were bitten?
A. I was bitten.
Q. Where were you bitten?
[fol. 110] A. On the left leg above the knee.
Q. How do you know you were bitten?
A. Well, I know I was bit because I slapped my pants leg and crushed it.
Q. What do you think you crushed?
A. Well, it was something, some insect.
Q. Have you any idea—

The Court: What was that?
Mr. Dudnik: It was some insect.

Q. Have you any idea as to the size of that insect?
A. Well, it was the width of them three fingers, overlapped, these three fingers.
Q. These three fingers?
A. These three fingers and my thumb. I crushed it with my thumb and my three fingers.
Q. And did you feel it crush?
A. I felt it crush.
Q. What happened after you crushed it?
A. I straightened out my leg to make sure, I felt something going down my leg, you know, it would go down.
Q. And did you feel it go down?
A. I felt it roll down the back of my leg.
Q. Did you see it?
A. No, I didn't.
Q. Have you ever seen it?
[fol. 111] A. No, I haven't.
Q. Why didn't you see it after it went down your pant leg?

A. Because the Diesel was too close to me and I didn't have time to pick it up.

Q. What did you do then when the Diesel came at you?

A. Well, the Diesel come, I got on the Diesel, and I showed the man on the footboard, I asked him to look. I told him I had a bite.

Q. Did you feel any pain?

A. Yes, I felt it.

Q. Was it severe or slight?

A. Well, it was severe from the beginning and it eased up later.

Q. You say you showed it to the man on the footboard?

A. On the footboard.

Q. Who was that man?

A. I don't know who that man was.

Q. Did you at one time think you knew who it was, or did you never know who it was?

A. No, I didn't think I knew who it was.

Q. Do you remember now who it was?

A. No.

Q. Did he look at it?

A. He looked at it.

Q. Was that while you were on the Diesel?

[fol. 112] A. On the Diesel.

Q. Then where did the Diesel go?

A. We went to West Street.

Q. What did you do?

A. I got off the Diesel and went and looked the cars over.

Q. Did you continue your tour of duty?

A. I did.

Q. During the time that you continued your tour of duty, did you feel any sensation at the place where you had the bite?

A. Yes, I did.

Q. And where, again, was the place?

A. Above the knee on the back of my thigh.

Q. When did you next do anything about that particular bite?

A. Well, when we got to Clark Avenue I have a locker there and I went in and washed it off with soap, washrag and water.

Q. Could you see it?
A. No.
Q. When was it that you did that?
A. That was about 7:00 p.m.
Q. When did you eat, before or after?
A. After.
Q. And when did you eat that day?
A. About 7:15.
Q. Was that at your supper hour then?
A. Yes, it was lunch hour.
[fol. 113] Q. After you washed it and had your dinner, did you continue to work?
A. Yes, I continued to work.
Q. Did you finish your tour of duty that day?
A. I did.
Q. When did you finish?
A. At 11:00 p.m. that night.
Q. From the time you washed it until 11:00 p.m. were you conscious of any sensation in back of your leg?
A. Yes, I was.
Q. Were you conscious of the sensation when you went home?
A. I was.
Q. What did you do then when you went home?
A. Well, I asked my wife to look at it. She says that I was bit.
Q. Did you tell her what happened?
A. And I told her what happened.
Q. Did she describe it to you?
A. Yes, she described it.
Q. Were you alarmed about it?
A. No, I wasn't alarmed about it.
Q. What did you do that night?
A. I got in the bathtub, took a bath, and went to bed shortly after that.
Q. What did you do about it the next night, the next day?
[fol. 114] A. Nothing.
Q. Did it keep you from working?
A. No, it didn't.
Q. Were you conscious of a sensation?
A. Yes, I was.

Q. Did it ever leave you?

A. No.

Q. Did you do anything about it the following day, and the following day, say, for the next four or five days?

A. Well, for the next three or four days there was nothing done about it.

Q. Were you alarmed about it?

A. No.

Q. When did you first become alarmed about it?

A. When she told me it was forming like a boil.

Q. Like a boil?

A. Like a boil, and it was going to bust.

Q. Did it bust?

A. I got in the bathtub. I got in the bathtub and when I got out she told me that it busted.

Q. What did you do then?

A. Then, the only thing I had was carbolic salve. I put carbolic salve on it.

Q. Did you see a doctor?

A. Yes, the first off day I had, that was on a Thursday, [fol. 117] I went to a doctor.

Q. How many days after that, do you know, after the bust?

A. No, it wasn't but a couple of days.

Q. Who did you see?

A. Dr. Heller.

Q. What did Dr. Heller do for you?

A. Well, the first thing he gave me was a shot of penicillin.

Q. By the way, had Dr. Heller treated you before?

A. He was my family doctor.

Q. And do you recall some of the things he treated you for?

A. Yes, he treated me for my back, and that's about all I guess.

Q. Do you recall ever seeing him about your chest?

A. Yes.

Q. What was the incident that sent you, that got you to Dr. Heller with regard to your chest?

A. Well, I was working at DuPont Chemical at the time when an argument arose, and as I was eating a sandwich

I just happened to get into this argument, and I made a swallow and it seemed to have stuck in my chest.

Q. And that is what you went to see him about?

A. That's what I went to see him about.

Q. Was that cleared up?

A. That cleared up.

[fol. 116] Q. Now, Dr. Heller gave you a shot of penicillin the first time you saw him with relation to this bite, and did you see him again?

A. Yes.

Q. How long after that?

A. A day, the next day.

Q. Did you continue to work?

A. Yes.

Q. How many times did you see him altogether, do you recall?

A. About half a dozen times.

Q. Now, on the last time that you saw him what did he tell you?

A. He told me, he says, "I will have to put you in the hospital."

Q. What did you do?

A. Well, I went to another doctor.

Q. Who did you go to?

A. Ippolito.

Q. Dr. Ippolito?

A. Ippolito.

Q. How long after the last visit to Dr. Heller?

A. It was right after the visit.

Q. Did Dr. Ippolito examine you?

A. He examined me.

Q. Was your wife with you?

[fol. 117] A. She was.

Q. What did Dr. Ippolito say to you after he examined you?

A. He says, "You are going to the hospital."

Q. This time did you agree to go?

A. I went.

Q. How long after he said that to you did you get into a hospital?

A. The next day or two.

Q. And what hospital?

A. Marymount.

Q. By this time were you able to see any part of the sore on your leg?

A. No.

Q. What did Dr. Ippolito do for you in the hospital?

Mr. Dudnik: Am I in your way, sir?

Juror No. 7: No.

Mr. Dudnik: Thank you.

A. They took cultures and examinations.

Q. What did he do by way of treatment other than the examination and cultures?

A. He operated. Skin—

Q. How long—I am sorry, Jim?

A. Skin graft.

Q. Now, before the skin graft didn't he do something else?

[fol. 118] A. I don't remember.

Q. Do you remember?

A. I don't remember.

Q. Before the skin graft, Jim, may I ask you whether you recall that he did a debridement operation, which was cutting away of the flesh, do you recall that?

A. Yes, I recall that.

Q. Was that the first operation?

A. That was the first operation.

Q. How long after your first entrance to Marymount did you have that debridement, if you recall?

A. That was only a couple of days after.

Q. Did he put you to sleep?

A. Yes.

Q. And how did you feel afterwards?

A. Sickly.

Q. Now, after you got over the effects or whatever it was that put you to sleep, did you begin to feel anything about your leg?

A. Yes.

Q. What did you feel?

A. Pain.

Q. What kind of pain was it?

A. It was a sharp burning pain.

Q. Following that did you have a skin graft operation?
[fol. 119] A. Skin graft.

Q. Now, can you tell me how long between the debridement and the skin graft?

A. No.

Q. You can't?

A. No.

Q. What did he do by way of a skin graft, can you tell us?

A. No, I can't tell you. They just took skin off my right thigh and that's all I can say about it.

Q. Were you able to see the area that the skin was taken from?

A. Yes.

Q. Will you describe that?

A. It was raw.

Q. Was it sore?

A. It was sore.

Q. Could you tolerate it?

A. What?

Q. You had no trouble tolerating that pain, did you?

A. Well, yes, to a certain extent, it pained enough that I—

Q. That you knew it was there?

A. Yes.

Q. How about the area that the graft was made on, was that sore?

A. That was painful.

[fol. 120] Q. How long did you have that graft before any other surgery was done on you?

A. I don't remember. I can't, I don't remember.

Q. All right, Jim. You were in Marymount the first time about four months, were you not?

A. Right.

Q. During those four months did you have more than the debridement and the one skin graft?

A. Yes.

Q. What did you have?

A. Well, they were cutting away, and skin grafts.

Q. Were there several of those?

A. Yes.

Q. Were they painful?

A. They were.

Q. Was your leg, the site of the trouble, getting more painful, less painful, or did it stay at the same level of pain?

A. That was always painful, severe pain.

Q. Did they give you anything for pain?

A. I was taking demerol at the time.

Q. Demerol?

A. Yes.

Q. At the end of four months or so, or to be precise, on December 8th of 1954 you went home, and you were home [fol. 121] for about, oh, four days less than a month, were you not?

A. Yes.

Q. What did you do when you were home?

A. Nothing. I tried crutches once, and then I stayed in bed from then on.

Q. Could you get along with crutches?

A. No.

Q. Could you go to the bathroom?

A. No.

Q. Who took care of you?

A. My wife.

Q. During that period did she dress you every day?

A. She did.

Q. I mean the wound.

A. Yes.

Q. Tell me, what did you experience when the bandage was taken off?

A. Well, pain.

Q. Was it intensely painful?

A. Intensely painful.

Q. And was that every day?

A. Every day.

Q. What happened to the area that the doctors treated during that month, did it get better, stay the same or get worse?

A. It just kept getting worse.

[fol. 122] Q. Were you able to see it yet?

A. No, not yet.

Q. How do you say it was getting worse, I mean, can you explain what you mean by it was getting worse, Jim?

A. Well, one thing, the bandage, it came off, you could see the size, it was getting bigger in area.

Q. What was getting bigger?

A. This—

Q. This sore?

A. This sore, and there was more pain to it.

Q. Did you finally go back to the hospital, Marymount?

A. Yes.

Q. How long were you there the second time?

A. (No response.)

Q. Is about 15 months correct?

A. I was going to say about 14 months.

Q. Tell me about that 15-month stay in the hospital, Jim.

A. What is there to say?

Q. Will you keep your voice up? Are you getting tired?

A. I am getting tired.

Q. Would you like a little rest, Jim?

A. Yes.

The Court: We will have a very brief recess. You won't retire to the jury room. You may go out and get a drink of water and smoke a cigarette.

[fol. 123] Be ready to come back in a few minutes. Will you all assemble there. Are all 14 of you there? I just want to make sure that you are admonished not to talk to anyone while you are out in the hall there regarding this case.

(Thereupon a recess was had.)

The Court: Before you get started again, Mr. Dudnik, may I say to the ladies and gentlemen of the jury, as you have noticed I have cautioned you every time you leave the room whether it is for recess or the termination of the case at the end of each day, and every noon hour.

I want to further caution you, and I have cautioned you, and you have been cautioned during the impaneling of the jury, to be careful in reading newspapers and listening to comments on the radio or television or any other medium as it has to do with this case.

I caution you once more not to form any opinions from anything you read or see concerning this case.

You may proceed.

[fol. 124] By Mr. Dudnik:

Q. Jim, I asked you to tell us about the 15 months in the hospital at Marymount, and you said "What is there to say?"

Well, let me put it to you this way, to make it brief, did you have many surgical procedures there?

A. Yes.

Q. Did this infection spread?

A. Yes.

Q. Can you tell us to what parts of your body it spread?

A. Under my arm, my right side here on the back, and my ankle.

Q. Are you pointing to your left or right ankle?

A. Left ankle.

Q. Were you bandaged every day?

A. Bandaged every day.

Q. Were these areas running?

A. Running.

Q. Were they running with pus?

A. That's right.

Q. And how did the bandage, how did you feel when they bandaged you?

A. That was painful.

Q. How many operations did you have at Marymount?

A. I don't remember.

Q. You haven't any idea?

[fol. 125] A. No.

Q. Were you given narcotics for the relief of pain?

A. I was.

Q. Following the 15 months' stay at Marymount—by the way, during that time at Marymount was there an odor from those areas?

A. Yes.

Q. When did the odor begin?

A. Oh, some time after I went back to the hospital.

Q. And did that odor continue?

A. It did.

Q. Through the balance of the stay at the hospital?
A. It did.
Q. What kind of an odor was it?
A. Terrible.
Q. And was it all the time?
A. All the time.
Q. Now, then, on March 8th of 1956 you went home, did you not?
A. Yes.
Q. And you stayed home about four or five months, did you not?
A. Yes.
Q. How did you feel during those four or five months, Jim?
A. The same. Just painful. I was taking narcotic pills [fol. 126] for the pain.
Q. Could you sleep?
A. Off and on, I couldn't sleep.
Q. Was the pain getting more severe or did it stay at the same level?
A. I would say it was more severe.
Q. What was happening to those areas that were operated on during the time that you were at Marymount the second time?
A. They were getting larger.
Q. What was happening to those operated areas when you were home during those four or five months?
A. They were getting larger.
Q. Did the skin grafts take?
A. None.
Q. They did not take?
A. No.
Q. And did the sores open up again?
A. They opened up.
Q. Were there some that you could see, Jim?
A. There was, after, I could see it, yes.
Q. Could you describe it?
A. Well, I don't know how to describe it.
Q. Would you keep your voice up for me?
A. It was stringy, various color, running.
Q. Was it running from more than one area?

[fol. 127] A. Yes, it was.

Q. Now, then, on July 30th you entered the Cleveland Clinic?

A. Yes.

Q. And you were there

The Court: What year is this?

A. Of 1956. '56.

Q. Now, I hope I am right, you were a patient at Cleveland Clinic from July 30, 1956, to July 21, 1958, isn't that right?

A. That's right.

Q. A period of about two years?

A. That's right.

Q. However, there were some periods during that time that you were home?

A. Two or three I think. At one time I think I was home for four days.

Q. Four days and you went back?

A. Then I had to go back.

Q. What was the longest period that you were home away from the hospital during the two years at the Cleveland Clinic?

A. Four days.

Q. That is your recollection?

A. Yes.

Q. Now, then, when you got into the Clinic the first time what shape were you in, Jim?

[fol. 128] A. Physically I was in good shape.

Q. Good shape?

A. Good shape physically.

Q. What was the condition of your area, sore areas?

A. That was undescribable.

Q. Were you in pain?

A. All the time.

Q. What is the first thing they did for you by way of treatment at the Clinic?

A. I don't know what they done.

Q. You don't remember?

A. I don't remember.

Q. Did you have any surgery there?

A. Yes.

Q. How many times were you in surgery during the some two years or less that you were at the Cleveland Clinic?

A. I couldn't count them.

Q. Were there many?

A. Many.

Q. How did you feel after each of those surgical operations?

A. Well, sick, miserable.

Q. And were you getting better?

A. No.

Q. Or were you getting worse?

A. I think worse.

[fol. 129] Q. Did you have many skin grafts?

A. Yes.

Q. Did you have daily dressings?

A. Daily dressings, once or twice a day.

Q. Once or twice a day. I want you to tell me how you felt when they took the bandages off?

A. It was painful, and I screamed. I used to scream.

Q. What is that?

A. I used to scream, holler.

Q. Did they ever have to take you in surgery and give you a general anesthetic to take your bandages off?

A. They did.

Q. How many times?

A. Oh, many times.

Q. Many times?

A. Many times.

Q. Under a general anesthetic?

A. Yes.

Q. Why was that?

A. Because it was so painful.

Q. Was there an odor about those areas at the Clinic?

A. There was.

Q. Was it constant?

A. Constant.

Q. Jim, what happened in May of 1958?

[fol. 130] A. I lost my first leg.

Q. What happened three weeks later, Jim?

A. I lost my second leg.

Q. How did you feel, Jim?

Are you ready to continue?

A. Yes.

Q. Do you want to live, Jim?

A. I want to live.

Q. You were discharged from the Clinic or rather you left the Clinic on July 21, 1958, did you not, Jim?

A. '58, that's right.

Q. Where did you go from there?

A. Highland View.

Q. Are you still there?

A. I am still there.

Q. What are they doing for you, Jim?

A. Therapy. Whirlpool. That's all.

Q. Jim, are your stumps healed?

A. One is. The other isn't.

Q. Is it still running?

A. There is a drainage.

The Court: What?

Mr. Dudnik: There is a drainage, your Honor.

Q. Jim, are you a narcotic addict?

[fol. 131] A. No.

Q. Were you?

A. Yes.

Q. Do you still take things for your pain?

A. I do.

Q. Do you have to take it every day?

A. Every day.

Q. Jim, do you have an open wound anywhere now?

A. On my arm.

Q. I am going to ask your wife to take the dressing off, and I want you to exhibit it to the Court and jury. Will you help him, Mrs. Gallick?

Is it safe to do it?

Mrs. Gallick: Yes, it is safe to do it.

Q. Jim, I am going to turn this around. I want the jury to see this.

Can all of you folks see that?

Now, Jim, I am not going to ask you to show your stumps. But is that skirt up as far as it can go?

A. As far as it can go.

Mr. Dudnik: Can all you folks see that?

Q. Jim, were you visited by any claim agents of the Baltimore and Ohio Railroad?

A. I was.

[fol. 132] Q. When was the first time you were seen by a claim agent?

A. I don't remember when, but it was at Marymount Hospital.

Q. Marymount?

A. Yes.

Q. Will you keep your voice up. Was it during your first stay or your second stay?

A. My first stay.

Q. Your first stay?

A. First stay.

Q. Did you at that time give them a statement of some kind?

A. Yes, I did.

Q. Which you signed?

A. I signed.

Q. Who was there when you signed it?

A. Spinelli and Robinson.

Q. Spinelli and Robinson. Were they both claim agents of the railroad?

A. They were.

Q. Was there anybody there representing you?

A. No.

Q. When did you retain a lawyer in this case, Jim?

A. In '56.

Q. Some two years later?

A. Yes.

Q. And that was Mr. Cook—

[fol. 133] A. Cook.

Q. —who in turn was kind enough to retain me?

A. Right.

Q. Jim, did you keep a time book of every day that you worked?

A. I did.

Q. And does that show the shift you worked and the days you worked and the hours you worked?

A. Yes.

Mr. Dudnik: You have copies of this.

Q. I am going to hand you this book—mark it.

(Plaintiff's Exhibit 11 was marked for identification by the reporter.)

Q. It is marked Plaintiff's Exhibit 11; what is this, Jim?
A. It is the time book.

The Court: What?
Mr. Dudnik: Time book.

Q. I believe it has records starting in 19 what, Jim?
A. This is from April 16th.
Q. April 16th?
A. To the 31st.
Q. Of what year? What I mean is this, Jim, about how many years does this cover?
A. '51.
Q. '51?
[fol. 134] A. '51.
Q. Through the time you worked until you left work as a result of your accident?
A. Right.
Q. Jim, I am going to turn to the month of August of 1954. You have a word written there after the date August 10th, and what does that word say?
A. That says "Bug."
Q. When did you put that in there, Jim?
A. It was after when I was visited by Spinelli and Robinson.
Q. Was there any particular reason that you did it?
A. No, just to give me an idea of about the date.
Q. And you still cannot tell the jury with any certainty as to—
A. No.
Q. —as to the exact date?
A. No.
Q. It has been called to my attention that I may have overlooked asking you a question, Jim.
I want you to tell me whether or not on the day that you had the accident the ditch contained the things you described that were in it most of the time?

A. Yes.

Mr. Dudnik: You may cross-examine.

The Court: Ladies and gentlemen of the jury, in order [fol. 135] to give the plaintiff a little rest period, there will be another short recess.

Once more, when you go out of here and have a smoke and drink of water, remember the admonition not to talk about this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

Cross examination of James T. Gallick.

By Mr. Hadden:

Q. Jim, before I start out I just want to make it clear to you that I have no intention to make it any more uncomfortable for you than it already is, and if it becomes that way please let me know.

Jim, you say in 1954 you were living in Parma; how long had you been in Parma?

A. A year and a half.

Q. Year and a half?

A. Year and a half.

Q. Was this a new house for you?

A. This was a new house.

Q. You were doing some work around your place, weren't you?

A. Well, yes.

Q. You did some work on your garage?

[fol. 136] A. I painted it.

Q. And did you have a garden in the vicinity of your house?

A. No, no.

Q. But you did have a yard?

A. Yes.

Q. With a lawn?

A. With a lawn.

Q. During the summer of 1954 while you were doing the work of which you speak, did you ever have occasion to be out in your back yard with shorts on?

A. No, I never wore shorts.

Q. You never wore shorts?

A. No.

Q. Do you remember the date that you moved into your house in Parma?

A. No, I don't.

Q. It was in the year 1953, was it?

A. Maybe.

Q. You can't be sure?

A. No.

Q. What can you tell me, Jim, about the weather in the month of August, 1954?

A. Well, it was nice weather.

Q. It was nice weather?

A. Nice weather.

[fol. 137] Q. Can you recall at the present time ever having seen or heard any thunderstorms or any bad storms during that month?

A. No.

Q. Would it be fair to say that perhaps for three weeks or a month before your insect bite there had been no real heavy rains?

A. No, there was no heavy rains.

Q. Now, while you were on the Number 2 yard job or Seneca Street job during the month of August, Jim, I would like to get it a little more clear in my mind exactly what area it was that you had to work in.

As I understood it, you came to work every day at the Seneca Street yard office, is that right?

A. Yes.

Q. And that is located maybe a couple of hundred yards from the Columbus Road bridge?

A. Yes.

Q. Now, during the course of your ordinary working day on that job, how far to the north along the B & O tracks would you go?

A. To Whiskey Island.

Q. That is an island on the shore of Lake Erie, isn't it?

A. Yes.

Q. Right up as far north as you can go?

A. Yes.

[fol. 138] Q. How far south would you get?

A. To Clark Avenue.

Q. To Clark Avenue?

A. Not during the afternoons, though.

Q. Well, sometime every day you would get down to Clark Avenue?

A. Yes.

Q. And would that be at the south end of the Clark Avenue yards?

A. Yes, south.

Q. In other words, you would work in and around the yards also?

A. Where?

Q. Well, your work took you through the yards not just up to them?

A. We would take our cars to Clark Avenue, disconnect the engine and come back to the yard, switchman's shanty there, and go to lunch.

Q. In any event, your work did take you down to the Clark Avenue yards, that is right, isn't it?

A. Yes.

Q. Now, in the course of traveling back and forth along the B & O tracks between the limits that you have mentioned, you had to pass many industries on both sides?

A. Yes.

[fol. 139] Q. And you had to travel, it would be fair to say, wouldn't it, throughout the flats area?

A. Yes.

Q. What was your habit, Jim, so far as the clothes that you wore on the job in the summertime?

A. Like any other man. A shirt, trousers, and I always wore a 10-inch, that is 10 inches high, Chippewa shoe.

Q. 10-inch high Chippewa shoe?

A. Yes.

Q. That would come up above your ankle, is that right?

A. Yes.

Q. What can you say about your pants, were they the regular khaki pants that most people wear in the summertime?

A. Yes.

Q. And they came down to the top of your shoe, did they?

A. No, they came down to the ankle.

Q. To the ankle. Do you remember whether it was that sort of clothing you were wearing on the date that this insect bite took place?

A. It was.

Q. Did you have socks on?

A. Yes.

Q. What sort of socks were they?

A. They were cotton socks.

Q. How high up your leg did they come?

[fol. 140] A. I would say they were about 12 inches high. So they overlapped the shoe about 2 inches.

Q. I see. Were they turned down over the shoe top, or did they stick up?

A. No, they had elastic.

Q. They had elastic tops?

A. Yes.

Q. On the day of this insect bite, Jim, I would like to get a little more clear in my mind exactly what your movements were.

Please, again, if you begin to get tired, please let me know.

The Court: Are you tired now?

A. No.

Q. You reported to work as you said at the Seneca Street yard office?

A. At the yard office.

Q. I am not sure exactly what time you arrived on this particular day?

A. I would say around 2:00, which was regular for me.

Q. I understand you to say that it was regular that you arrived at 2:00?

A. Around 2:00.

Q. Now, Jim, do you recall in August of 1957 while you were a patient in the Clinic, that Mr. Dudnik and Mr. Nu-[fol. 141] renberg and myself and a court reporter came to see you, and we took your deposition?

A. Yes.

Q. Do you recall telling me on that occasion that your usual time of arriving on the job was 2:30 in the afternoon?

A. No, I don't.

Q. You deny that you said that, sir?

A. I don't remember saying it. But I still say it was 2:00.

Q. It is your opinion that 2:00 was the time rather than 2:30?

A. That's right.

Mr. Hadden: May I have a second or two, your Honor?

The Court: Surely.

Q. Jim, I am going to read to you a question and answer or two from your deposition, merely for the purpose of finding out whether this refreshes you on what was said back in August of 1957.

I asked you—

Mr. Dudnik: Page and line?

Mr. Hadden: That is Page 62.

Q. The question: "You are not able to say then where you have been or what you had done during the half hour or so that you had been working before you were stung?

"A. Yes. I was in the yard office a half an hour before [fol. 142] talking on the telephone.

"Q. You had been in the yard office?

"A. Yes.

"Q. And you came to the yard office at 3:00?

"A. Before, before 3:00. We generally get there around 2:30.

"Q. Around 2:30?

"A. 2:30.

"Q. And how long would you ordinarily be there?

"A. Well, we would get to work at 3:00. Get there at 2:30, get to the telephone, quarter to three or 3:00, and stay at the telephone 15 or maybe 20 minutes, and then go out and pick up the Diesel."

Now, Jim, does that refresh you on the questions and answers that we had?

A. Yes.

Q. And do you say it is true or not true that you got there at 3:00—excuse me, at 2:30 or at 2:00?

A. 2:00.

Q. You deny what you said at the deposition, then, is that right?

A. Yes.

Q. You were under oath at that time?

A. Yes.

Q. In any event, you got your orders from Clark Avenue [fol. 143] on the telephone, is that right?

A. That's right.

Q. How long did that take you?

A. What?

Q. To get the orders over the telephone.

A. Oh, 15 minutes, 20 minutes.

Q. Then did you proceed on to do your work?

A. Then we proceed out to do our work.

Q. What did you do during the other 40 or 45 minutes that you were in the yard office?

A. We have a locker there, sit in the shanty, loaf, talk.

Q. You loafed for 45 minutes, then you proceeded out to your engine, and I think you said that you left your lunch bucket and your lantern there, is that right?

A. Yes.

Q. On the engine?

A. On the engine.

Q. And you went to the spur yard?

A. Spur yard, Track 7.

Q. Track 7. If I am correct, Track 7 was a track which lay between the river and tracks leading into the freight station, freight house, is that right?

A. That's right.

Q. And how long were you there?

A. 10, 15 minutes.

[fol. 144] Q. And after having done your work there you proceeded where?

A. I waited until the Diesel was coming out. The Diesel passed me. Then I started towards the river track.

Q. Which way was the Diesel going?

A. The Diesel was going south.

Q. That is, back in the direction of Sherwin-Williams?

A. Sherwin-Williams.

Q. What was its purpose in going back there?

A. To throw the switch, so we go to West Street.

Q. Did you have anything to do with the throwing of the switch there?

A. No, I wasn't at that point at all.

Q. I see. So you went directly from the spur yard towards the Columbus Road bridge?

A. Yes.

Q. Now, Jim, I think when you were answering Mr. Dudnik's questions, you said when you got underneath the bridge you stopped?

A. I stopped.

Q. And how long is it that you say you stopped?

A. Oh, a half a minute.

Q. Half a minute?

A. Wait a minute. I didn't finish my question.

Q. Excuse me, I beg your pardon.

[fol. 145] A. Half a minute, maybe 45 seconds.

Q. What was the purpose of your stopping?

A. To see that the engine, the Diesel, was coming towards me.

Q. From the position that you stopped and turned could you see the Diesel?

A. Yes.

Q. Could you see it as far as the switch point where it had to back up and then come back towards you?

A. That's right.

Q. You could see that far?

A. That's right.

Q. What did the Diesel engine do while you watched it?

A. Threw the switch and he started back.

Q. That is, the switch was thrown and you saw him coming back?

A. Yes.

Q. Was it at that time that you felt the insect bite?

A. No.

Q. When was it?

A. When I seen the Diesel was coming back I turned around, started walking north, and I took a couple of steps when this insect bit me.

Q. It was shortly then, it was right after you had stopped and looked down the track, is that right?

A. (Witness nods.)

[fol. 146] Q. Can you give me some estimate of how long it was between the time that you turned back to continue your walking and the time you felt the bite?

A. I took about two steps.

Q. A matter of one or two seconds then perhaps?

A. Yes.

Q. In other words, at least a very short time?

A. Yes.

Q. At that point the Diesel engine had just started to move toward you, is that right?

A. No, he started to move towards me up until I watched him.

Q. Well—

A. And then I turned around and started walking north.

Q. The point I was getting at was whether you turned and started to walk as soon as you saw him begin to move toward you?

A. Yes.

Q. Jim, showing you Plaintiff's Exhibit 2, I will ask you to say what that is, if you can tell.

A. That is the ditch.

Q. Can you identify the track for me and what it showed at the time?

A. That is the river track.

Q. In which direction is that looking, is that looking back [fol. 147] towards where your Diesel was?

A. Yes. That is south, looking south.

Q. So if we give our attention then to the right hand side of this picture, that shows more or less the view that you had as you stopped and you say you turned around and looked towards your Diesel, is that right?

A. Yes.

Q. Now, can you tell me by looking at this picture whether the point of the switch is shown?

A. No.

Q. You can't see it?

A. No, I can't see it. That was taken on a curve angle.

Q. Jim, returning once again to the time two years ago when your deposition was taken, do you recall saying anything at that time either to Mr. Dudnik or to myself when we questioned you with regard to stopping and turning

around in the middle of the track for half or three-quarters of a minute?

Mr. Dudnik: There is an objection, your Honor, unless there is something in there as to whether he stated something differently. But whether he recalls, if the question wasn't asked there would be no question of recollection.

So there is an objection to that question.

Mr. Hadden: Your Honor, it is a perfectly proper question on cross-examination.

[fol. 148] Mr. Dudnik: Are you laying the foundation?

Mr. Hadden: I am.

Mr. Dudnik: I withdraw the objection.

The Court: Proceed.

Q. Do you have the question in mind or would you like to have it read, Jim?

A. Read it.

Mr. Hadden: Read the question, please.

(Last question was read by the reporter.)

A. I can't remember saying it.

Q. Jim, I want to read you a few questions and answers here.

Mr. Dudnik: The page, please?

Mr. Hadden: Page 24, towards the end, towards the bottom.

Q. Mr. Dudnik was questioning you at the time of these questions and answers, and I will read them.

"Q. Now, describe this incident in your own words, Jim.

"A. Well, I started towards West Street, and I was over in the spur yard first. I crossed Lime Road, started walking underneath the Columbus Road bridge when I got an awful bite on my left leg."

Do you remember those questions and answers?

[fol. 149] A. I do.

Q. Do you remember saying, Jim, that while you were walking under the Columbus Road bridge you got a sting?

A. Yes.

Q. Now, I am interested in the date of this accident.

Mr. Dudnik: Just a moment. If your Honor please, I now renew my objection to the question in which he said he was laying a foundation. The question wasn't asked. Therefore I renew my objection. The question was never asked whether he stopped or didn't stop on his deposition, and then I withdrew my objection when Mr. Hadden said he was laying the foundation, and I thought—

The Court: As I remember it, I think Mr. Hadden was reading from the deposition, and asked if the plaintiff remembered saying the language that was read from the deposition.

Mr. Dudnik: Yes, but I am talking about the objection before that.

The Court: I don't think we ever got an answer to it anyway.

Mr. Dudnik: All right, I am sorry I said anything. It is all right, your Honor. I mean by that I am not pressing the point.

The Court: I don't think there was an answer to that [fol. 150] question, because Mr. Hadden then went into the deposition and read from the deposition.

Mr. Dudnik: In other words, he asked him whether he remembers being asked anything about stopping under the bridge.

The Court: That's right, and there was never an answer to that.

Mr. Dudnik: And the witness said he didn't remember.

The Court: There was never an answer to that question, as I recall.

Mr. Dudnik: Then he did not read any question with relation to stopping under the bridge. There is no such thing in the deposition, as I see it, your Honor. That is why I am objecting to the question, because Mr. Hadden said he was laying a foundation apparently to show that the witness said something else on his deposition. As a matter of fact, he did not, your Honor.

Mr. Hadden: Well, that is just the point, your Honor.

The Court: The last question and answer may stand.

Q. Mr. Gallick, with respect to the insect which bit you, [fol. 151] or which you claim bit you, as I understood it, you

felt a stinging sensation behind your left leg inside your pants, is that right?

A. I felt the bite.

Q. You reached down with your left hand and you grabbed an object inside your pants?

A. Right.

Q. With the first three fingers of—

A. Three fingers.

Q. Of which hand?

A. Of the left hand.

Q. Of the left hand?

A. And the thumb.

Q. And the thumb?

A. Yes.

Q. And you squeezed it?

A. I squeezed it.

Q. Now, you said you heard a—

A. A crack.

Q. Did you hear the crack or feel the crack?

A. Both.

Q. Can you describe with somewhat greater accuracy how big around it was?

A. Well, I would say about as big around as my little finger.

Q. As big around as your little finger?

[fol. 152] A. Yes.

Mr. Hadden: May we have the record show that is maybe half an inch in diameter?

Mr. Dudnik: Call it any way you want.

Q. Would you hold your hand up again so I can see what your three fingers look like?

An inch and a half to two inches long?

A. Two inches.

Q. Two inches. So in your best judgment, whatever it was that was under your pant leg was about two inches long and perhaps half an inch in diameter?

A. (Witness nods.)

Q. Perhaps the size of a peanut, would that be?

A. I think a peanut is a little bigger.

Q. A little bigger?

A. Yes.

Q. You have never described it in that way, have you?

A. No.

Q. And you felt it roll down your pant leg?

A. I did.

Q. When it rolled down your pant leg, can you give me any estimate of how long that was after you had turned around and started to walk towards West Street?

I understood you to say two to three seconds, or two [fol. 153] seconds, to be more exact, between the time you started to turn—

A. Yes, I took a couple of steps.

Q. —that you slapped your leg?

A. Yes.

Q. And then immediately the bug rolled down your pant leg?

A. After I slapped it, it rolled down my leg.

Q. So that the time lapse from the moment you started to walk back in the direction that you had started out, and the time this insect rolled down your leg, if that is what it was, was maybe five seconds, is that a fair statement?

A. No, it would be longer than that.

Q. It would not be?

A. It would be.

Q. It would be. How long would it be?

A. From the time I turned around and started walking north, I would say it would be closer to between 30 and 45 seconds.

Q. I want to make sure you understand the question, and that is after you had stopped and looked around, you say from the time that you then turned to go back, took two steps, slapped the insect and it fell down your pant leg, that was 30 to 40 seconds?

A. Yes.

Q. What can you tell me, Mr. Gallick, about the condition of this pool as you described it, over the years that you [fol. 154] worked there? If I got your direct testimony correctly, you worked for the B & O and had occasion to be under that bridge for something like ten years, is that right?

A. Off and on, yes.

Q. Off and on?

A. Yes.

Q. And for the last four—

A. Four years.

Q. —quite regularly?

A. Regularly.

Q. Would it amount to more than once a day sometimes?

A. Yes.

Q. If you went through one way, you had to come back again, didn't you?

A. Yes.

Q. So it would be twice a day, at least twice a day?

A. Yes.

Q. Now, during this period of ten years that you saw it occasionally, and four that you saw it regularly, was the condition so far as insects, stagnant water, and the like, the same?

A. It was.

Q. That is to say, it got neither worse nor better in the given time that you had to be there?

A. It was always filthy.

[fol. 155] Q. Please answer the question. It neither got better nor worse during the time that you had occasion to see it?

A. No, it got no better or no worse.

Q. And that condition was filthy as you described it?

A. Yes.

Q. Exactly what do you mean by the word filthy?

A. Filthy is part rotted hides of dead pigeons, dead rats, dead insects, flying in and around that area.

Q. And by that area do you mean the area directly under the bridge or some larger area?

A. That area under the bridge and other.

Q. And some other area, also?

A. Yes.

Q. What area was it in addition to the part of the bridge?

A. South of the bridge.

Q. South of the bridge?

A. And north of the bridge.

Q. Both south and north of the bridge?

A. Yes, sir.

Q. Taking the north part first, how far to the north of the bridge did this condition prevail?

A. Oh, I would say about 50, 75 feet.

Q. Was it restricted in that area to the east side of the tracks?

A. Yes, mostly.

[fol. 156] Q. Well, there was no water on—

A. No.

Q. —on the west side of the tracks, was there?

A. No, there wasn't.

Q. How about to the south of the bridge, how far—

Mr. Dudnik: Didn't he say south—wasn't that south, or north?

Mr. Hadden: North.

Mr. Dudnik: I am sorry.

Q. How about south of the bridge, how far did the area extend in that direction?

A. That was covered with dead rats and rotted hides.

Q. Maybe you didn't understand the question. The question was how far did that area extend?

A. All the way to Sherwin-Williams.

Q. All the way to Sherwin-Williams. And how great a distance would that be?

A. About 200 yards.

Q. When you say Sherwin-Williams I take it you mean the first part of the Sherwin-Williams buildings, or did it go beyond that?

A. The first part.

Q. The first part?

A. To their overhead bridge.

Q. To their overhead bridge; that is an overhead bridge [fol. 157] that crosses over the river track and goes between two parts of their plant?

A. That don't cross over the river track.

Q. Well, it does go between—

A. It crosses over the east and west—the main track there, what we call the main track.

Q. That is not the river track down there?

A. No.

Q. When you say that this area extended that far to the south, what exactly do you refer to, do you refer to a wide area or to a narrow area?

A. The width of the tracks.

Q. The width of the tracks. Is that to say, then, that these insects, rats and other things were on the tracks, or that it was just the width of it?

A. What do you mean on the tracks or the width of it?

Q. You said the width of the area that extended down to Sherwin-Williams was the width of the tracks. Now, I am trying to find out whether you mean to say that that was the area, the tracks are the area that had the filth on?

A. Our right-of-way.

Q. It was the width of the tracks, and the things that you described were on the tracks themselves, then?

A. Yes.

Q. Can you give us any estimate of how many dead [fol. 158] pigeons you may have seen on any given occasion right under the Columbus Road bridge?

A. Under the Columbus Road bridge?

Q. Yes, the place where you say you were bitten?

A. Well, I never counted them.

Q. Well, was it one?

A. Oh—

Q. Was it five thousand?

A. No. I would say twenty.

Q. Twenty?

A. Or more.

Q. Twenty or more, and when you say twenty do you mean that those were dead pigeons?

A. Dead pigeons or dying pigeons.

Q. Was there ever a time that you can remember when there were fewer pigeons than that?

A. Yes.

Q. When was that? I thought this condition remained pretty constant from what you told me?

A. Well, I never, just like I say, I never counted them.

Q. Am I now to understand there were times when there were fewer?

A. Yes.

Q. Can you give me some estimate of how many dead pigeons, dead or dying pigeons you may have seen?

[fol. 159] A. Oh, say twenty or thirty.

Q. Is that the fewest you ever saw?

A. Yes.

Q. Are you getting tired?

A. I am getting tired.

Q. Well, then let's suspend, may we, your Honor?

(Counsel and the Court conferred at the bench.)

The Court: Ladies and gentlemen of the jury, the bailiff will adjourn Court for the day in just a moment.

Before he does, you will remember there will be no Court tomorrow, and you will report back at 9:15 Monday morning, once more with the admonition that you do not talk with anyone about this case, not even amongst yourselves.

(Thereupon an adjournment was taken to 9:15 a.m. Monday, June 15, 1959, at which time the folowing proceedings were had:)

[fol. 160] Monday morning session, 9:15 a.m., June 15, 1959

The Court: Ladies and gentlemen of the jury, by agreement of counsel on both sides, we are to take the testimony of two witnesses out of order before we complete the cross-examination of the plaintiff.

You will remember when we adjourned last Thursday the plaintiff was being cross-examined by defense counsel.

At this time I understand the plaintiff is calling two other witnesses; is that right?

Mr. Dudnik: Yes.

Mr. Leasure: Yes.

Mr. Dudnik: Dr. Heller.

Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness DR. JACOB R. HELLER, who, being first duly sworn, was examined and testified as follows:

Direct examination of Dr. Jacob R. Heller.

By Mr. Dudnik:

Q. Dr. Heller, will you state your name in full, please?
A. Jacob R. Heller, H-e-l-l-e-r.
[fol. 161] Q. Where do you live, sir?
A. 3000 West Sulgrave Oval, Shaker Heights.
Q. Are you a licensed practicing physician in this community?
A. I am.
Q. Where did you take your medical training, Doctor?
A. Ohio State University, West Virginia University.
Q. When did you graduate?
A. 1928.
Q. Following that did you intern in any hospital, sir?
A. I did.
Q. Will you tell us where?
A. St. John's Hospital, Cleveland, Ohio.
Q. How long did you intern at St. John's?
A. One year.
Q. Following that what did you do, Doctor?
A. I went into active general practice.
Q. And have you been actively engaged in the general practice of medicine since 1929?
A. I have.
Q. And has all that time been in Cleveland?
A. It has.
Q. Doctor, are you associated with any hospitals in this community?
A. I am.
Q. What are they?
[fol. 162] A. Polyclinic Hospital.
Q. Doctor, do you operate a clinic of your own?
A. I do.
Q. What is that known as?

A. Industrial Emergency Hospital.

Q. Doctor, I will ask you if you are acquainted with the plaintiff in this case, Mr. James Gallick?

A. I am.

Q. How long have you known him profesionally?

A. About 15, 20 years.

Q. Do you recall when you first treated him professionally for anything?

A. Exactly I don't remember.

Q. Doctor, I believe I asked you to check all the records that you have on Mr. Gallick for me, did I not?

A. Yes.

Q. And did you check them and take them all out?

A. I did.

Q. And did you give them to me?

A. All those I had available.

Q. The records consist of six cards, do they not?

A. Yes.

Q. Do you have any other records with regard to Mr. Gallick other than what I have here?

A. None that I could locate.

[fol. 163] Q. Doctor, according to your records when is the first time that you saw him, according to the records that you have?

A. January 2, 1950. That is, I didn't see him, but he was in the office at that time.

Q. Now, according to this record of January 2, 1950, you did not see him?

A. No.

Q. Did somebody else in your office see him?

A. Yes.

Q. Who was it, if you know?

A. It may have been my nurse or one of my associates.

Q. I see. What does this record show was wrong with him?

A. He evidently had complained of some back disorder, and he had been rendered diathermy treatment, and he was to return for me to see him. But there not being any other notation, he did not return.

Q. Does that record show a history as to what happened to cause him a back discomfort?

A. No.

Q. Do you know what happened to cause him the back discomfort?

A. No.

Q. Now, Doctor, according to the second record which you have, when did you next see him?

A. December 4, 1950?

Q. Does that record indicate what you saw him for?

[fol. 164] A. Yes.

Q. And what does it state?

A. Bruising and contusion of the right thigh. Ruptured muscle fibers, with interstitial hemorrhage.

Q. And does that record indicate what you did for him, Doctor?

A. Yes.

Q. Will you tell the jury what it was?

A. Heat, support, immobilization.

Q. What do you mean by immobilization?

A. Keeping the part quiet.

Q. Does that record indicate how many times you saw him for that condition, Doctor?

A. Yes.

Q. Will you tell us how many times you saw him?

A. About 20 times.

Q. When was the last time you saw him, Doctor?

A. It would be January 22, 1951.

Q. I take it then you saw him over a period of approximately two months?

A. Approximately, yes.

Q. Now, according to your records, when was the next time that you saw him, Doctor?

A. March 10, 1951.

Q. Does your record show for what condition you saw [fol. 165] him on March 10 of '51?

A. Pain in the chest and down his left arm.

Q. Did he give you a history as to how this happened?

A. Pardon?

Q. As far as those records show?

A. None that I recollect.

Q. And you recollect no history?

A. No history.

Q. What did you do for him, Doctor?

A. I examined him and gave him a sedative.

Q. How many times did you see him for that condition?

A. One time. Incidentally, he was told to come back, which he didn't, either.

Q. He did not come back?

A. No.

Q. Now, Doctor, the next time that you saw him according to your records was when?

A. February 23, 1952.

Q. Do you know what he was seen for, or for what complaint he was seen at that time?

A. Well, I have no notation here, but from—

The Court: What year was this, February 23rd.

A. 1952. From the treatment rendered, he was probably, he had a cold.

[fol. 166] Q. How many times did you see him for that condition?

A. Once.

Q. Now, Doctor, when was the next time you saw him?

A. January 31, 1953.

Q. Does that record indicate what you saw him for?

A. From the method of treatment rendered, probably it was a complaint of weakness.

Q. Do you know what type of weakness?

A. No, not particularly. Perhaps just generalized. The ordinary complaint of feeling out of sorts.

Mr. Leasure: I think I will object to that. The doctor said he doesn't know. I object to the theorizing on the part of the witness.

The Court: The latter part of the doctor's statement will be disregarded by the jury.

Q. I take it, then, Doctor, you don't know what his complaint was?

A. No.

Q. And you have no independent recollection of what it was?

A. Not specifically.

Q. All right. How many times did you see him, Doctor?

A. Once.

Q. Once or twice?

A. Once.

Q. Now, Doctor, when is the next time that you saw Mr. [fol. 167] Gallick?

A. August 26, 1954.

Q. Does your record show a history of any kind that he gave you?

A. No.

Q. Do you know what you saw him for?

A. He had an infection, boil-like type of raising on his leg.

Q. Doctor, did he give you a history of how he got it?

A. I have no recollection. I made no note of it if he did.

Q. In other words, you don't know anything about how he sustained this infection?

A. No.

Q. Nor do your records show it?

A. No.

Q. Nor do you have any independent recollection?

A. I do not.

Q. Can you describe the condition, if you recall it, when you saw him on August 26 of 1954?

A. It was a boil-like type of infection, raised off the skin, about the size of a quarter to half a dollar, and it was sort of weeping in character.

Q. Weeping in character?

A. Yes.

Q. What do you mean by weeping, Doctor?

[fol. 168] A. A slight drainage was just pouring out of the head of it.

Q. What did you do for him on that occasion?

A. I told him to apply heat. I gave him a sulfa ointment dressing and a penicillin injection.

Q. You gave him a dressing and an injection?

A. Right.

Q. When did you see him the next time, Doctor?

A. August 28th.

Q. What did you do for him on that occasion?

A. I redressed the infection and gave him another shot of penicillin.

Q. When did you see him the next time, Doctor?

A. September 2nd.

Q. Of '54?

A. '54.

Q. What did you do for him on that occasion?

A. Redressed the wound, but gave him no injection.

Q. When was the next time you saw him, Doctor?

A. September 7th.

Q. Of 1954?

A. Yes.

Q. What did you do for him on that occasion?

A. Redressed the wound and gave him an injection of dihydro-streptomycin.

Q. What was the appearance of that infection? Was that [fol. 169] the last time you saw him, Doctor?

A. The last time.

Q. What was the appearance of that infection the last time you saw him?

A. It wasn't responding to treatment.

Q. What do you mean by the fact that it wasn't responding to treatment?

A. It had the appearance of getting a little bit larger. It hadn't receded. The drainage had not become softer or more liquefying.

Q. Did you at that time recommend any further treatment for him?

A. I told him that under the conditions, my own impression at the time was that inasmuch as it wasn't responding, that we ought to look into this further, and I recommended that he ought to be hospitalized for further investigation.

Q. Did he come to see you following that recommendation?

A. I have not seen him since.

Q. You have not seen him since?

A. No.

Q. Doctor, according to this record, you have a legend here—withdraw that.

Will you read me the legend on this record right below the name?

A. Well, I-n-f, that stands for infection. R, right, and [fol. 170] leg.

Q. Doctor, you have here infection right leg. Do you have an independent recollection of whether it was his right or left leg, Doctor?

A. I do not.

Mr. Leasure: What was the answer?

(Last answer read by the reporter.)

Q. When you saw him and during the time you treated him, did he have one or more than one area of infection?

A. Just one.

Q. If the hospital records show that the area of infection was the left leg, Doctor, how would you account for it?

Mr. Leasure: Just a moment. I think I will object to that, your Honor. It is argumentative and asking this witness to speculate.

The Court: The objection will be sustained.

Juror: I didn't hear that.

The Court: What is that? Did you hear the objection? You didn't hear the question or the objection?

Mr. Dudnik: I think, your Honor, they had the question but not—

The Court: You heard Mr. Dudnik's question?

[fol. 171] Juror: Yes.

The Court: But you did not hear the objection. There was an objection raised by Mr. Leasure, and the Court has sustained that objection.

Q. Doctor, I note from your records beginning with the very first one, the card says Gallick, J.J.

The second one says Gallick, James. The third one says Gallick, Mr. John.

The fourth one says Gallick, James. The fifth one says Gallick, J.

And the sixth one, the last one, says Gallick, John.

Doctor, was that one and the same man?

A. It was.

Q. Can you account for the discrepancy in the names, Doctor?

A. No, except that he responded to both names.

Q. And is that why you put a different name, the name John on one card and James on the other?

A. Yes.

Q. Do you know what has happened to Mr. Gallick since?

A. Except only what I have heard from his wife and from you.

Mr. Dudnik: You may cross-examine.

[fol. 172] Cross-examination of Dr. Jacob R. Heller.

By Mr. Leasure:

Mr. Leasure: Did you have those cards marked that you were referring to?

Mr. Dudnik: No.

Mr. Leasure: I think we better have these marked so the record at some time will show what has been referred to here.

Mr. Dudnik: Would you keep them in order. You can mark them Plaintiff's exhibits.

Mr. Leasure: Well, they are not in order. I will get them in order. Mark them Defendant's exhibits.

(Defendant's Exhibits A, B, C, D, E and F, the cards referred to, were marked for identification by the reporter.)

By Mr. Leasure:

Q. Doctor, you testified about some treatment of Mr. Gallick on March 10th, 1951. Is this the card you had in mind when you testified about that? I am handing you Defendant Exhibit C, I believe it is.

A. Yes.

Q. Yes. I notice at the top of that it appears to be Mrs. John Gallick. Will you check that?

A. Well, it might have been, but it was for him.

[fol. 173] Q. You think it was for him?

A. Yes.

Q. Well, does it say Mrs. John Gallick at the top?

A. It could be interpreted that way. But you know doctors' handwritings.

Q. That is my problem.

A. Yes, mine, too, sometimes.

Q. That is our constant problem, doctors' handwriting. Well, in any event, Defendant Exhibit C does relate to Mr. John Gallick?

A. Yes.

Q. And not Mrs. even though it may appear Mrs. at the top, is that correct?

A. Yes.

Q. All right. Now, doctor, on August 26 you stated that you saw and treated Mr. Gallick. Is Defendant's Exhibit F the card that you prepared on that occasion?

A. Yes.

Q. All right. Doctor, from the cards that you have here, which you have testified about, about treatment of this patient and your records prepared in consequence thereof, I take it that your usual procedure at your office, at least, is to make out one of these three by five cards when the patient comes in?

A. Yes.

[fol. 174] Q. Is that correct?

A. That's right.

Q. Then if he comes back for repeat visits for the same problem, you make subsequent entries on the same three by five card, is that correct?

A. Sometimes. Sometimes it is recorded on a ledger sheet which the nurse transcribes.

Q. You mean then no entry would be put on the card?

A. Oh, yes.

Q. If it is put on the ledger sheet?

A. It would. Sometimes it might not.

Q. So we can't be sure that these cards are complete here, is that the idea?

A. Well, they are complete as far as whatever knowledge I have about treating him, yes.

Q. Well, I don't get the distinction between putting an entry on one of these cards, and putting it on the ledger sheet. Will you explain that?

A. You asked me my procedure of what happens—

Q. Yes.

A. —in a general way, meaning that sometimes it could happen as the secretary transcribes she may omit a name, or may omit a notation, transcribing from the ledger sheet to that.

Q. Let's take this Defendant's Exhibit F, the card for [fol. 175] August 26, 1954. Whose handwriting appears on that, Doctor?

A. That is my handwriting.

Q. All of it?

A. All of it.

Q. Can we be sure or can't we be sure that all of the visits that Mr. Gallick paid to you following August 26, 1954, appear on this card?

A. Well, sometimes patients will call. Sometimes they will come in and we make no notation.

Q. So we can't be sure that this is complete then, is that it?

A. Well, as far as that, as pertains to that particular condition, I would say it is complete.

Q. Well, I still don't get your distinction between what you put on here and what goes into some other record.

A. No, nothing goes into any other record except what is on there.

Q. You mean the ledger sheet is made up from this?

A. I have an Industrial practice and a private practice. Once in a while when the nurse will take care of a private patient she will make a notation on the ledger sheet which is the Industrial sheet. The secretary, thinking perhaps that I have made a similar notation on the card, will omit it. Whereas, I may have thought that she put it on, and in that way it gets missed.

[fol. 176] Q. There are some omissions, then, is that it?

A. It could happen.

Q. Now, have you looked over your ledger sheet for visits by Mr. Gallick?

A. No.

Q. So you don't know what that might show?

A. No.

Q. Now, when a patient comes in to you for the first time on a particular condition, even though he might have been a patient previously, do you make up this three by five card at the time he is there ordinarily?

A. Ordinarily, yes.

Q. So that it is made at the time you obtained your knowledge?

A. That's right.

Q. Or—

A. When I first seen him.

Q. And rendered your treatment?

A. That's right.

Q. When a patient comes in with a history of having suffered an accident, or some unusual occurrence which has led to his condition, you ordinarily put that down, don't you?

A. If it is something unusual.

Q. Well, accidents you consider unusual, don't you?

[fol. 177] A. Yes.

Q. And you put what you call a history of that down on your card here, don't you?

A. That's right.

Q. If it is anything that may help you in your treatment, or your diagnosis of the patient, you put that down on your card for reference, don't you?

A. I do.

Q. I notice on this one card here for December 4, 1950, Defendant's Exhibit B, which you testified to as involving a rupture of the thigh muscle, you put down a history on that one, didn't you?

A. Yes.

Q. Namely, jumping off of locomotive, and hurt right thigh, you made that entry, didn't you?

A. Yes.

Q. You thought that was important, didn't you?

A. Yes.

Q. Now, is this a fact, Doctor—I think we can shorten it this way—is this a fact that in so far as your record shows, and in so far as your knowledge or your recollection is concerned, it appears that Mr. Gallick came to you on August 26, 1954, suffering from an infection of the right leg, isn't that correct?

A. Yes.

[fol. 178] Q. And there is no history or no statement of events on your card which would indicate that either he did not relate anything to you about how that came about, or you did not think it significant medically, is that correct?

A. That's correct.

Q. Now, you described this condition that he had as a boil-like thing. Do you have a specific personal recollection of that, Doctor?

A. Well, in a general way I do.

Q. You mean you are relying on your own memory now and not the fact that you had something entered on a card, is that correct?

A. No, from memory.

Mr. Dudnik: Keep your voice up, Doctor.

A. I am sorry.

Q. I want you to tell us all you can about the exact appearance of that boil-like thing at the time he first came to see you on August 26th I think it was, 1954?

A. It had the appearance of a typical boil, raised off the skin, intergraded, red, firm base. The head of it was a little bit open. There was a little weeping discharge, as I related previously. And it was tender.

Q. All right. Is that the extent of your medical description of it?

[fol. 179] A. Yes.

Q. Now, the term boil, is that a medical term?

A. Well, not especially.

Q. What is the medical name for a boil?

A. Infection. Infected process.

Q. How about a furuncle?

A. That is not a boil. That is a small infected pimple.

Q. Which may grow up to be a boil, is that it?

A. That's right.

Q. Now, you see many boils, or boil-like appearances on people's skin, I assume from time to time, do you?

A. I do.

Q. Has it been your experience that the usual history or the typical history given by the person is that, well, I had a pimple there and it got bigger or something to that effect, it got yellow on top?

A. It could be one of several ways if they do happen to tell you.

Q. All right, if they do happen to tell you. Well, let's not speculate then. I take it, Doctor, when this man first saw you there was nothing to distinguish the condition of

his leg medically from an infection that comes about through the infection of a hair follicle, something of that kind?

A. The first visit, no, but the—

[fol. 180] Q. All right.

Mr. Dudnik: Just a moment. Let him finish.

A. But the third or fourth sort of made me suspicious that it wasn't acting in the ordinary way that the ordinary infected process does respond.

Q. You mean it wasn't responding to treatment in the way that they ordinarily do?

A. Yes.

Q. Now, did you at any time during your attention of this man take a smear of this infection and have any culture made of it?

A. That is not the usual procedure.

Q. Well, you did not do it?

A. No.

Q. So you can't say what type or kind of infection was there, I assume?

A. Oh, I could.

Q. Well, what is the usual procedure when you want to find out what exact infection is involved, don't you make a smear of it and have a culture made?

A. No, not generally at first, because the characteristics of the infection will indicate to the doctor what type of organism is usually involved.

Q. That is the general type?

[fol. 181] A. There are two general types which are the staphylococcae or the streptococcae.

Q. Those are the two general types of infection on the skin?

A. Infected organisms, yes.

Q. As a matter of fact, that is the usual type of infection, not only of the outer skin but sore throats and things of that kind?

A. Well, then you become involved with the pneumococcae and with any of the other types.

Q. You mean with a sore throat you can have a bigger choice?

A. Yes.

Q. But on the outer skin it is usually streptococcae or staphylococcae?

A. That is the most prevalent.

Q. As a matter of fact, could you tell from looking at this man's condition as to what type of bacteria was the infecting agent here?

A. Yes, to a certain extent.

Q. To a certain extent, what do you mean by certain extent?

A. Well, a staphylococcic type of infection produces a boil-type of reaction in a person. A streptococcic type of infection does not produce that. The streptococcic type of infection is one that usually gives you the appearance of blood poisoning. You see a very small pimple-like or pune- [fol. 182] ture of the skin, with red streaks up the arm, and a great deal of systemic involvement. The staphylococcic type of infection at first is localized.

Q. It is localized and doesn't run a red streak?

A. Yes.

Q. And it doesn't look like it is getting into the system, is that about it?

A. Yes.

Q. What appearance did this have to you, if you recall?

A. I would say it was a staphylococcic type at the beginning, my first impression.

Q. So it was localized?

A. Localized.

Q. Let's see now. You gave this man a shot of penicillin on the first visit, as I recall it; is that correct? Do you want to look at your card here?

A. Yes, penicillin.

Q. Penicillin and some kind of ointment?

A. Sulpha ointment.

Q. Sulpha ointment and heat. You mean you applied the heat at your office?

A. No. Heat in the sense we told him to soak it, and put on sulfate or epsom salt compresses.

Q. And the purpose of that is to bring it to a head?

A. To bring it to a head.

[fol. 183] Q. And make it break?

A. Yes.

Q. You wanted it to break?

A. To localize it, to keep it from spreading, and also to heal.

Q. And the sulpha and the penicillin is to attack the bacteria that are infecting, is that correct?

A. That's correct.

Q. That is the usual and ordinary type of treatment for this type of skin infection?

A. It is.

Q. This type of treatment has nothing to do with an insect bite per se, does it?

A. Well, at first, that wouldn't enter into it at all.

Q. That wouldn't enter into it at all. There was no appearance here that led you to believe that he was suffering from any kind of insect poison or toxin, was there?

A. None at all.

Q. It just looked like an ordinary skin infection?

A. Yes.

Q. Now, at any time while he was under your care, Doctor, did he show any signs or symptoms of suffering from any insect poisoning or toxin?

A. None that was apparent to me.

Q. None apparent to you, all right. Were the signs and [fol. 184] symptoms present in his case the usual ones accompanying a localized skin infection?

A. Pardon me?

Mr. Leasure: Read the question.

(Question was read by the reporter.)

A. Yes.

Q. And these skin infections can come about in many different ways, can't they, Doctor?

A. They can.

Q. As a matter of fact, the staphylococcus which you mentioned is a kind of bacteria that is usually upon a person's skin; isn't it, on the outside?

A. Yes.

Q. It could well be on this table top right here, is that correct?

A. In the air. Any place.

Q. In the air, the floor, anything we touch?

A. Correct.

Q. It is just all about us, all the time?

A. Correct.

Q. We are subjected to it in everything we do and every place we are, isn't that correct?

A. That's right.

Q. It can come about from—well, let me ask you this. [fol. 185] Doctor, isn't it a fact that the skin, normal healthy skin, has openings all over it in the nature of pores?

A. The openings are protected.

Q. Protected to some extent, yes, but they are openings, aren't they?

A. Yes.

Q. Have you known cases where a sweat pore becomes plugged up and becomes infected?

A. Oh, yes.

Q. That often happens, doesn't it?

A. Yes.

Q. Or around a hair follicle an infection will develop?

A. That could be.

Q. That could be, too. So there doesn't have to be any break in the outer skin for skin infection to develop, is that correct?

A. Well, there has to be a break. Perhaps not, one that is apparent—let me explain.

Q. Well, let me ask you.

Mr. Dudnik: Just a moment. Your Honor, may I ask that the witness be permitted to answer?

Q. Go ahead.

The Court: He may complete his answer.

[fol. 186] Q. Go ahead. It just wasn't responsive, that's all.

A. There has to be—

Mr. Leasure: How do you know? Are you testifying?

The Court: Let the witness testify.

Mr. Dudnik: He is a competent doctor, that is how I know.

A. There has to be a break. Most breaks aren't apparent to the naked eye. As long as there is a microscopic break. Microscopic break in the natural barriers of the body which resists the infected processes, to which we are daily subjected. Once you get a break, then the invading organism takes hold.

Q. Then—I am not sure, I don't know whether you are making a distinction or not, and I want to find out—do you classify the infection of a hair follicle or a sweat pore as constituting one of the breaks in the skin that you referred to?

A. Well, breaks in the tissue. I would not say skin. But breaks in the tissue. And skin is tissue just as mucous membrane is tissue.

Q. Will you answer my question? I am trying to find out, Doctor, whether you are classifying sweat pores and hair follicles as openings in the skin which would constitute in your language breaks in the skin?

[fol 187] A. I don't follow your differentiation there.

Q. Well, let me ask you this question: If it takes a break in the skin, even microscopic, for a staphylococcic infection, let's say, how does a hair follicle or a sweat gland become infected?

A. Well, it is hard—if I could draw it I could show you.

Q. Well, does that constitute a break in the skin or an opening in the skin?

A. You see, you have your skin and the hair follicle, or the sweat gland, let's say, hangs like a grape, to an enlargement.

Q. Underneath the skin?

A. Underneath the skin. Well, that lining is a mucous lining. That is made up of cells which resists the normal invasion of the surface organism. When you get a break in that tissue, whether it is a breakdown from external, due to some trauma, or from internal due to some disease, then this invading organism or this ever-present organism, which is the streptococcae or the staphylococcae, makes itself at home and then the infected process starts.

Q. So that you say the hair follicle and the sweat glands do constitute, call it a depression?

A. Yes.

Q. You could call it an opening, couldn't you, with your soft—what kind of material did you say it was?

[fol. 188] A. It is a mucous membrane lining.

Q. Mucous membrane like you have in your mouth?

A. That's right.

Q. And these organisms can get a hold in that material?

A. Yes.

Q. And also not only from a traumatic break in the skin, even microscopic but also from an unhealthy condition of the skin, that can provide sufficient basis for the infection to start, did I understand you correctly on that?

A. Yes, it could.

Q. So there are literally many many ways in which a skin infection can start, is that correct?

A. That's correct.

Q. Then let's take something else, too, Doctor, since we are on this subject. What is an ordinary little pimple that shows up on the skin that is pink, and raised up a little bit?

A. Well, medically as you stated before we would call it a furuncle. It is an infection

Mr. Dudnik: It is an infection.

A. It is an infection, yes.

Q. All right, it is an infection which causes a little pimple?

A. Yes.

Q. Usually nature will take care of that without it getting [fol. 189] into anything big, is that correct, take care of itself?

A. If nature is taking care of it, it wouldn't have started.

Q. Let me ask you this and I am trying to draw on my own experience; I will have a pimple or red place show up here on my arm or leg perhaps, I don't do anything about it and it goes away. How does that happen?

A. You are an exception.

Q. I am?

A. Most of the time it leads to other complications and troubles.

Q. Well, the white corpuscles in the blood attack that small infection, don't they?

A. Yes.

Q. And oftentimes kill it by themselves?

A. Yes.

Q. Without any ointment or shots or anything else, isn't that correct?

A. Well, that isn't the prevalent way.

Q. That is, if you have good blood or healthy body, that may happen?

A. In our experience, most everybody has done something, either in the form of an antiseptic or the form of a hot application or something like that.

Q. Or mercurochrome or something like that?

A. Yes.

[fol. 190] Q. But everyone of those doesn't turn into a boil, does it, and turn from bad to worse, does it?

A. No.

Q. As a matter of fact, if you scratch one of those things and pick the head off, there is a chance for more infection right there, isn't there?

A. It could spread.

Q. The bacteria from under your thumb nail, for example?

A. Yes.

Q. Then, Doctor, is this the fact in summary, that according to your records and the best of your recollection, Mr. Gallick came to you on August 26, 1954, suffering from infection of the right leg, and he did not relate to you any particular history or story as to how it had come about?

A. That's right.

Q. And you treated him for that in the same way that you would treat any ordinary skin infection, but this one didn't happen to respond to treatment?

A. That's right.

Q. At no time when you saw him did he exhibit any signs or symptoms of any poison or toxin from any insect or anything else, as far as that is concerned, is that correct?

A. Not that was apparent.

Mr. Leasure: I think that is all.

[fol. 191]

Redirect examination of Dr. Jacob R. Heller.

By Mr. Dudnik:

Q. When you say, Doctor, that no poison or toxin infection was apparent, what do you mean by that, Doctor?

A. Well, that was the purpose of my suggesting that he be hospitalized, so we could do more detailed laboratory and investigative work to determine as to why this process wasn't responding to the normal treatment.

Q. Did you advise him to go into a hospital because it was getting worse?

A. Yes, definitely.

Q. Doctor, did you advise him to go into a hospital because this condition did not respond like a usual localized streptococcae or staphylococcae skin infection?

A. I did.

Mr. Dudnik: Thank you, Doctor.

Recross examination of Dr. Jacob R. Heller.

By Mr. Leasure:

Q. While we are on that, Doctor, this staphylococcic bacteria doesn't always respond to treatment, does it?

A. Of late it hasn't more so.

Q. So the fact that it doesn't respond to treatment doesn't mean that it is something other than an ordinary staphylococcic infection?

A. Not necessarily.

[fol. 192] Q. One other thing, Doctor. I think you mentioned in the beginning of your testimony, that you brought with you all of the records that you could find?

A. That's right.

Q. Undoubtedly you either do have or have had other medical records of Mr. Gallick, is that correct?

A. Well, let me put it this way, in respect to all my patients about every ten years I go through the files, and those cases or those cards that indicate conditions of minor nature we just discard them and we feel that they would

have no particular significance, as far as the course of the person's or the patient's duty or health problems. So we discard that.

Q. Well, do you know whether that was done in the case of Mr. Gallick, or are you speculating now as to that is what might have been done?

A. No, definitely it was done. He with other patients. I would say fifteen or twenty years I have known the family.

Q. Are you telling us then that you don't have any records of any patients back past 1950?

Mr. Dudnik: Just a moment.

A. Yes, if they are of a serious nature, yes.

Q. In other words, you go through each of these cards every ten years and decide what you are going to keep and what you are going to throw away?

[fol. 193] A. That's right.

Q. One other question on this staphylococcae bacteria. Did I understand you to say that in your judgment that was the type of infection he had when he saw you, from the appearance of it?

A. From the appearances at first I would say it was of that type.

Q. And that is the kind that we literally find every place around us at all times?

A. Yes.

Q. So that whenever we have even a microscopic break in the skin, there is a good chance that some of that may get in?

A. That would be the most commonest, the staph or the strep. Of course, it could be other types.

Q. In other words, whenever we have a nick on our skin or a weak place develop because of natural causes or anything else that would give the slightest opening, we would expect either staphylococcus or streptococcus to get in, some of it anyway?

A. Yes. That would be our primary expectation.

Q. No matter where you are or how clean you try to keep yourself, and so on?

A. That's right.

Mr. Leasure: That is all.

The Court: Anything further of this witness?

[fol. 194] Mr. Dudnik: I don't think so. Thank you, Doctor.

Do you mind leaving your records here, Doctor?

The Witness: That is perfectly all right.

The Court: Ladies and gentlemen of the jury, because of a problem of records here, we will recess a little earlier this morning, to give counsel an opportunity to examine these records.

You will return to the jury room, once more with a caution that you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

[fol. 195] Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness HELEN EBERWEIN, who, being first duly sworn, was examined and testified as follows:

Direct examination of Helen Eberwein.

By Mr. Dudnik:

Q. Will you give us your name, please?

A. My name is Helen Eberwein.

Q. Where do you live, Miss Eberwein?

A. In Cleveland, Highland View Hospital grounds.

Q. Is that your residence?

A. That's right.

Q. What is your position?

A. I am medical record librarian.

Q. Did you pursuant to a subpoena bring all of the records that are at Highland View Hospital pertaining to James Gallick?

A. I did.

Q. Is he still a patient there?

A. He is.

Q. Miss Eberwein, I am handing you a sheet from the Highland View Hospital records which is identified as No. 3, and ask you if you can tell us—by the way, are you in charge of all the records at the hospital?

A. The records are only in my custody after discharge. [fol. 196] But they are all available to me.

Q. I see. You are the librarian?

A. That's right.

Q. And how long have you been the librarian?

A. Five and a half years.

Q. At the hospital?

A. At the hospital.

Q. Now, going to Sheet No. 3 of the Highland View Hospital records, can you tell us what that is?

A. This is a physical examination done on Mr. Gallick at the time of admission.

Q. At the bottom part of that sheet there is a heading diagnosis?

A. That's right.

Q. Can you tell us what that is?

A. This is the diagnosis that is made following the physical examination at the time of admission.

Q. Do you know how soon after admission to the hospital that diagnosis has to be made?

A. They are given 24 hours. The residents are given 24 hours.

Q. That is not a final diagnosis?

A. It is not.

Q. Do you know the meaning of the word provisional diagnosis?

A. Provisional diagnosis is the same thing as an admitting diagnosis. It is not conclusive.

[fol. 197] Q. Not conclusive?

A. Not conclusive.

Mr. Dudnik: Your Honor, I wish to state that Mr. Leasure and I have agreed to have Miss Eberwein photostat certain of the records which we both want to use, because Miss Eberwein says they cannot be left with the Court in view of the fact that Mr. Gallick is still a patient at the hospital.

Is that agreeable with your Honor?

The Court: Without objection it may be done.

Mr. Dudnik: You may photostat two sets, one for me and one for Mr. Leasure, and we will pick them up.

Any questions?

Mr. Leasure: No, I have no questions.

The Court: Call your next witness.

Mr. Dudnik: Mr. Neff.

[fol. 198] Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness CYRIL W. NEFF, who, being first duly sworn, was examined and testified as follows:

Direct examination of Cyril W. Neff.

By Mr. Dudnik:

Q. Mr. Neff, I am going to ask you to speak loudly enough so that all of us can hear you. We often get competition from Lakeside Avenue.

Will you state your name in full?

A. Cyril W. Neff.

Q. And your address, sir?

A. My office address is 417 Engineers Building, downtown, and 6886 Pearl Road, Middleburgh Heights in the suburb.

Q. Where do you live, sir?

A. I live at 4006 Albertly Avenue in Parma.

Q. I take it then that you have two offices?

A. That's correct, sir.

Q. What is your business or profession?

A. I am a civil engineer and a surveyor.

Q. Where did you study your civil engineering?

A. At the University of Notre Dame, Notre Dame, Indiana.

Q. When did you get your degree?

A. In the year 1923.

[fol. 199] Q. Then following that what have you done, Mr. Neff?

A. Following my degree I practiced my profession of civil engineering until the present time.

Q. And are you still actively engaged in the practice of civil engineering?

A. Yes, sir.

Q. Broadly and briefly, what does the profession of civil engineering entail?

A. The profession of civil engineering entails the design and practice of the installation of sewers, water lines, paving, structures, buildings. In fact, anything pertaining to construction.

Q. Are you a member of any engineering society, sir?

A. Yes, I am a member of the American Society of Civil Engineers since the year 1943.

Q. Are you a registered professional engineer?

A. Yes, sir.

Q. Did you at my request, Mr. Neff, make a survey of a certain area underneath and around the Columbus Road bridge in the flats of Cleveland?

A. Yes, sir, I did.

Q. And did you do that for the purpose of coming to Court and giving certain testimony?

A. That's correct, sir.

Q. Did you personally make this survey?

[fol. 206] A. I did, sir.

Q. And did you have help doing it?

A. I had help. I had one of my surveying crews as assistants.

Q. Did you following that make a sketch, rather, a blueprint of the area which you surveyed?

A. I did, sir.

Q. And beside surveying it did you make certain studies of that area for the purpose of giving us certain information?

A. Yes, sir.

Mr. Dudnik: Will you mark this?

(Plaintiff's Exhibit 12 was marked for identification by the reporter.)

Q. I hand you what has been marked for identification as Plaintiff's Exhibit 12 and ask you what this is, sir?

A. That is a plat of the survey of the area in the vicinity of the Columbus Road bridge.

Q. Mr. Neff, I am going to put it on the blackboard here. I wonder if you would be kind enough to step down here, Mr. Neff, and pointing to the map tell us exactly what you did, and what your survey showed?

The Court: Gentlemen, I wonder, I won't be able to see it anyway, if you get it in this area right here, it will be a little closer to the jury.

Mr. Dudnik: If it is all right with the Court.

[fol. 201] The Court: Is that all right where you are there?

Mr. Leasure: Yes, it is all right if it is all right with the Court.

A. Ready?

Q. Yes.

A. We located the existence of this railroad track marked B & O Railroad, and it is so shown by these two lines, indicating the two rails of the spur track.

We located the ditch which drains the area from this track, and from the surrounding areas, and we so indicated by the e two dashed lines running in this fashion to this point.

At this point we located an overpass which carries Columbus Road over this railroad track, and we have indicated the abutments of this bridge.

Underneath this bridge we found an area here which is indicated by these dashed lines and dotted lines of an area that was under water.

We located this ditch which is so indicated here by these two dashed lines to a point here where a tile starts, a 10 inch sewer pipe tile, and it goes underground in this direction.

This tile goes over to this point which is a rectangular [fol. 202] concrete manhole, a junction manhole.

We discovered here by taking off the covering that this tile enters this manhole at this point. Another tile coming in this direction enters it on this side. And a third tile leaves this manhole and goes in this direction.

Q. Now, Mr. Neff, I am going to interrupt ...

A. That's right.

Q. I take it that this area here is that water you spoke about?

A. That's right.

Q. And is that under the bridge?

A. That is under the bridge.

Q. Now, how far did you go from—this would be the northerly end of the bridge, up to this point where you started your measurement?

A. We went about 110 feet.

Q. And how far did you go from the southerly edge of the bridge in a southerly direction?

A. Approximately 110 feet.

Q. Now, sir, what did you then do after you located those area points?

A. After those points were located, we took elevation, which means the levels of the existing ground at the points [fol. 203] indicated on this map.

In other words, we started with an elevation of 100 here at the top of this manhole, which is a datum plane.

Q. A plane, p-l-a-n-e?

A. P-l-a-n-e. It is a datum, it is called a datum plane which is an elevation, a known elevation, right here at the top of that manhole.

From that point by the methods of leveling with an instrument, a transit, we established the elevations of these points here which are indicated by these numbers.

Q. Now, starting from the most northerly point where you took the elevation, will you give us the data, with regard to the elevation?

A. Yes. The elevation at the top of the rail there at that point is 100.29, which means that that point is 3½ inches above this point.

Right opposite that we come to the ditch which we found to be 98.2.

Q. What does that mean with relation—

A. Which means that that elevation is 1 foot and 8/10, which is approximately 1 foot and 10 inches, in feet and inches, below this point, the top of this manhole.

We go down here 50 feet farther and we find the ditch elevation is 97.3, which is downgrade, which is a lower

elevation, which shows that this is downgrade. In other [fol. 204] words, any water that enters this ditch will flow in this direction.

We come down here to this area and we have 96.8, which is still lower.

Q. What does that mean, sir?

A. That 96.8 means that that is 3 foot and 2/10 below this datum plane. Now, this is the low point of the area, right here.

Q. Are you pointing to about the center, to the center of the ditch?

A. Yes, the northerly part of the flood area. We get down to this point which I indicated here as the swamp area, and we have an elevation here of 98.4. That is the lowest point we discovered, at this point.

And we continued down the ditch, at this point it is 98.3, which is very very little change in grade, practically flat, a tenth in about 30 feet.

Then we come down to the tile—

Mr. Leasure: Where is that?

A. Right here, sir. We come down to the tile which we call the invert, the tile which is the lowest point on the inside of the curved part of the tile, which is called the invert tile.

The invert of that tile is 96.41, which is slightly lower than this point here, which is about 11 100, which is about [fol. 205] an inch and $\frac{3}{8}$s higher than this point, which means that the water cannot go into that tile completely.

Q. When did you make this survey, Mr. Neff?

A. This was made on June 9th.

Q. Of this year?

A. Of this year, sir.

Q. Now, this invert tile you speak of, is that the pipe through which the water flows?

A. That is correct.

Q. Now, from your examination of the area, is that tile you just spoke about the outlet for water which is in the area under the bridge?

A. That's right.

Q. When you were there, did you or did you not see an accumulation of water under the bridge?

A. I saw water under the bridge.

Q. And did you see any water, any accumulation of water to the south of the bridge?

A. Yes, sir, in this ditch.

Q. Now, sir, did you examine the manhole that you spoke about?

A. Yes, sir.

Q. And did you examine the other pipes in connection therewith?

A. Yes, sir, I did.

[fol. 206] Q. Mr. Neff, did you examine the area that would be to the west of that two rail track?

A. Yes, sir.

Q. And did you examine the area all around this place?

A. Yes, I did, sir.

Q. Did you see any other wet areas when you were there?

A. No, sir.

Q. Was that the only one?

A. That is right.

Q. Mr. Neff, have you an opinion based on your professional experience, and based on your study of this condition, as to what is the cause of the accumulation of water under the bridge?

Mr. Leasure: I will object to that, your Honor. It certainly is not a complete question.

The Court: He may answer if he knows.

A. Yes, I have an opinion, sir.

Q. What is your opinion?

A. My opinion is this, that this water does not get out of this area for two reasons.

First of all, this area is lower than the pipe through which the water must necessarily leave.

And, secondly, it is my opinion that this pipe is plugged up from its entrance here, which I showed this invert, over [fol. 207] to the manhole.

Q. Have you an opinion—

Mr. Leasure: Just a minute. I ask that the latter part go out about the pipe being plugged up. I think that is speculation. They have shown no fact here to support that.

The Court: The jury will disregard the latter part of the witness' statement.

Mr. Dudnik: About the pipe being plugged up?

The Court: Plugged up, yes. He says it is his opinion that the pipe is plugged up.

Do you know of your own knowledge that it is?

The Witness: I know that the pipe is plugged up, sir.

Mr. Dudnik: He said, your Honor, his opinion for the accumulation is the plugging of the pipe and the lower area. May the answer stand, your Honor?

The Court: I don't think he said that. He has now corrected that statement, however.

Mr. Dudnik: May the answer stand, your Honor?

The Court: The latter answer may stand.

[fol. 208] Q. So I may be sure, then, you do know from your knowledge and observation that this pipe is plugged up?

A. That's right.

Q. Have you an opinion as to what causes the accumulation of water in the ditch starting south of the Columbus Avenue bridge as it extends in a southerly direction?

A. Yes, I have an opinion of that.

Q. What is your opinion?

A. My opinion is the fact that the pipe is plugged up does not allow the water to get out of that ditch.

Q. Based on your professional experience and your examination of studies in that area, have you an opinion—

A. Yes, I have an opinion.

Q. —have you an opinion as to what would have to be done to eliminate this water area under the bridge?

A. Yes, I have an opinion for that, sir.

Q. Will you give us your opinion, sir?

A. It is my opinion that this area which I show here as a swamp area should first of all be filled with slag or other suitable hard material, bringing the elevation of this up to a point where the water will flow from this area into the invert of this pipe.

Secondly, it is my opinion that this pipe should be cleaned out from its invert to its exit into the manhole which is indicated thusly.

[fol. 209] Q. Can you tell us, Mr. Neff, from your experience and your observation, is the project you suggest a large one or a small one?

Mr. Leasure: I object to that, your Honor.

The Court: I think the question ought to be rephrased.

Q. Can you tell us, Mr. Neff, whether that condition could be easily eliminated or not, sir?

Mr. Leasure: Objection, again.

The Court: Objection sustained.

Q. Can you tell us the approximate man hours it would take to do the work which you just suggested?

The Court: You may answer.

A. It is my opinion that with a force of five men, that this area could be filled to its proper elevation and the pipe cleaned out, in one day.

Q. And can you tell us whether or not with that work done it would be a permanent improvement?

A. It is my opinion that if that would be the solution, it would be a permanent improvement.

Q. Mr. Neff, I hand you what has been marked for identification Plaintiff's Exhibit 2, and ask you to look at it.

The Court: Will you turn that around so the jury can see it?

[fol. 210] Mr. Dudnik: I will in a moment, your Honor. I just want him to see it now.

The Court: All right.

Q. Now, I will turn so the jury may see it, and I will ask you to tell us what this is? Is this area under the bridge?

A. Yes, it is.

Q. Is this the water area you are talking about?

A. Yes, sir.

Q. Did you observe this in that area?

A: Yes, I did, sir.

Q. What is that, Mr. Neff?

A. Those are pilings which I indicated on my map as cribbing.

Q. Is that four-sided, sir?

A. That is four-sided, rectangular.

Q. What happens to water that gets into that area?

A. It is retained within the area of the piling.

Q. Do you know from your experience of any use for this piling under that bridge?

Mr. Leasure: I think I will object to that, your Honor. He can't possibly know the inner and under construction of that bridge.

Mr. Dudnik: He might know. I asked him if he knows; either he does or doesn't.

The Court: I think the question should be rephrased so a yes or no may come first.

[fol. 211] Mr. Dudnik: Read the question.

(Last question read by the reporter.)

Mr. Dudnik: Answer that yes or no.

The Court: May I see the piling that you are referring to?

Mr. Leasure: I am still objecting. He can't possibly know about that particular bridge.

The Court: Will you now read the question?

(Last question read again by the reporter.)

Mr. Dudnik: Answer that yes or no.

The Court: The objection will be sustained.

Q. From an architectural standpoint, is there any use for that piling under that bridge?

Mr. Leasure: I am objecting for the same reason. He has shown no particular knowledge of that particular bridge and its under-construction.

Mr. Dudnik: He would know. Mr. Leasure says he doesn't know. We don't know if he knows until he tells us, your Honor.

The Court: Well, I think it will call for a yes or no answer.

Mr. Dudnik: All right. May he answer that question [fol. 212] yes or no?

The Court: Yes or no, he may answer it yes or no.

Mr. Dudnik: Read the question and answer it yes or no when it is read, Mr. Neff.

(Last question was read by the reporter.)

Mr. Dudnik: In other words, you answer that yes or no.

A. Yes.

Q. Will you tell us if it has any use?

Mr. Leasure: Objection.

A. It has no use.

The Court: Objection overruled.
You may answer.

Q. It has no use you say, Mr. Neff, you say it has no use?

A. In my opinion it has no use.

Q. Can you tell us how many men and how many man hours it would take to eliminate this?

Mr. Leasure: I am still objecting to this line of questioning.

The Court: Overruled. He may answer.

A. It is my opinion that those piles could be removed in one day's time by two men with proper saws and equipment.

Mr. Dudnik: You may resume the stand. You may inquire.

[fol. 213] Cross examination of Cyril W. Neff.

By Mr. Leasure:

Mr. Leasure: I will stand over here. I don't want to move that and yet I don't want to be blocked from the jury here either.

Offer in Evidence

Mr. Dudnik: Before that, may I offer this in evidence? I offer this in evidence at this time, your Honor.

The Court: What are you offering, the blueprint?

Mr. Dudnik: The blueprint, yes.

Mr. Leasure: Show an objection.

The Court: The blueprint, that is Plaintiff's Exhibit 12, will be accepted into evidence.

By Mr. Leasure:

Q. Mr. Neff, I understand you have offices in the same building as Mr. Dudnik, the Engineers' Building?

A. That's right, sir.

Q. Have you done work of this kind for Mr. Dudnik before?

A. No, sir.

Q. This is your first job for him?

A. This is the first time.

[fol. 214] Q. Now, at what time were you down there, I am not sure that we have that fixed exactly, what date?

A. I was down there first of all, to look at it on June 8.

Q. Of 1959?

A. Of 1959, and again on June 9, at which time we did the job.

Q. So whatever knowledge you have relates to June of 1959, is that correct?

A. Sir? Beg pardon?

Q. Whatever knowledge you have is as of June, 1959?

A. That's right, sir.

Q. You don't know what the situation was in August of 1954, do you?

A. No.

Q. Now, along that line you testified that in your opinion this drain pipe from the end of the ditch here to this manhole was plugged up. You don't mean to leave the impression that it is completely plugged up, do you?

A. Yes, sir.

Q. You mean no water at all is getting through?

A. No water at all is getting through.

Mr. Dudnik: Will you keep your voice up, Mr. Neff.

Q. You mean if water was high enough to enter the entire pipe, still none would get through?

[fol. 215] A. That's right.

Q. Did you make any test of that kind to find out?

A. I observed it, sir.

Q. Did you make any running water test to find out?

A. No, sir.

Q. Of course, you have no idea what that situation might have been back in August of 1954, do you?

A. No.

Q. As far as you know, the pipe could have been completely open at that time?

A. It could have been, as far as I know.

Mr. Leasure: Then with that, your Honor, I would like to move that any testimony of this witness as to the present condition of that pipe go out, and the jury be instructed to disregard it.

Mr. Dudnik: If your Honor please, there is testimony that in 1954—

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

The Court: At this time, ladies and gentlemen, you will disregard the testimony relating to the pipe being plugged up at the time that the witness made the survey.

By Mr. Leasure:

[fol. 216] Q. Now, with that out, let's go to the elevations here and see where we are.

Would a copy of this help you if you have it in front of you?

A. I would appreciate it, yes.

Q. Let's see if I can get another one here. Now, what is the total drop in inches or feet, however you want to express it, between the level at the north end of this water, which I will point out here, and the end of this pipe as it enters the manhole?

A. That is a difference of .79, which would be 9½ inches.

Q. 9½ inches is the total drop then between the far end of this pool of water and the point where the pipe enters the manhole, is that correct?

A. That's right.

Q. And that is a distance of about how far?

A. About 150 feet.

Q. Now, about how much drop is there from this same point here at the end, the north end of the water, and the near end of this 10-inch pipe which I am pointing to now.

A. Where was your point, please?

Q. The reference point here is the north end of the water, and the north end of the pipe which would be the near end of the pipe.

A. Yes, yes. That is .39, which is $4^{5}/_{8}$ inches.

[fol. 217] Q. So that pipe then has a drop of about 5 inches, is that right?

A. $4^{5}/_{8}$ inches from those two points, is that your question, sir?

Q. Well, I take it that the pipe would have a drop of the difference between $91^{1}/_{2}$ and $4^{5}/_{8}$, am I right?

A. You mean the pipe—

Q. The 10-inch tile.

A. What is your question again, what is your question, sir?

Mr. Dudnik: I can't hear you, sir.

Q. We can get a direct reading from here. The north end of the pipe, am I correct, is 96.41?

A. That's right.

Q. And the south end of that 10-inch tile pipe is 96.01?

A. That is right.

Q. So it would be .4 of a foot?

A. .4 of a foot.

Q. Which is about 5 inches?

A. Which is $4^{3}/_{4}$ inches.

Q. So from here to here there is a fall of $4^{3}/_{4}$ inches?

A. That's right.

Q. In what distance?

A. In about 40 feet.

Q. Now, the pipe leading out of this manhole, which would be down drain, is how far below this 10-inch tile [fol. 218] where it enters the manhole?

A. That is .28, which is $3^{3}/_{8}$.

Q. 3⅜ inches?

A. Yes.

Q. Well, is it a fact, then, that the manhole end of this 10-inch tile here, the one leading from the ditch, the manhole end of that tile, cannot be dropped if this down drain is to continue to operate effectively?

A. Beg pardon, I didn't hear you.

Q. I am asking you whether it would be feasible to drop the end, the manhole end of this 10-inch pipe, which runs from the ditch here to the manhole?

A. No, it wouldn't be good engineering practice to drop that any more.

Q. And the reason for that is, is it not, that if you did drop it you wouldn't get any down drainage from the out tile here where it goes out of the manhole?

A. Not as good.

Q. Not as good. Of course, if you got it very much lower you would have back-up instead of outgo, from this 10-inch pipe here, isn't that the idea? In other words, you have only got 3⅜ inches to work in there, is that correct?

A. 3⅜ inches between the invert of the pipe going into the manhole, and the pipe leaving the manhole.

Q. In other words, if I get a piece of chalk here—let's [fol. 219] draw a manhole here so we know what we are talking about, and that is just a box-like affair, is it not?

A. That's right.

Q. With a cover on top?

A. Yes.

Q. Now, following the same directions you have up there, you have got this one pipe coming in from here, and that is this 10-inch pipe that leads down from the ditch?

A. Yes, sir.

Q. All right. You have got another one I see coming in from this other direction, and is that at about the same level?

A. No.

Q. Is it a little bit higher?

A. That is a little higher—that is lower than the one coming in.

Q. Oh, is that a 5 here?

A. It is lower than. The elevation of that one that you have just drawn is 96.01, and the other one coming in is 95.94, which would be about $\frac{7}{8}$ of an inch lower.

Q. All right, and then the pipe that leads out of that manhole—we have got drainage this way into the manhole, and this way—

A. Yes.

Q. And then we have a pipe leading out of the manhole to [fol. 220] get the water out of there, right?

A. Yes.

Q. And that one is the one coming down here?

A. Yes, that's right.

Q. Let's draw that in, and that one is $3\frac{3}{8}$ inches lower, right?

A. That's right.

Q. In other words, it is coming out toward me and not down, but that is the only way I can draw it.

A. That's right.

Q. So then the system there is, is it not, that water from this pipe goes in, water from this pipe over here goes in, and then the water gets out of there by going down this pipe towards the bottom of the blackboard there, right?

A. That's right.

Q. And the level of this is only about $3\frac{3}{8}$ inches higher than the level of this, is that correct?

A. Yes.

Q. So if you lower this, you say it wouldn't be good engineering practice to lower this, because if you lower it more than $3\frac{3}{8}$ inches you would get backed up here?

A. A little bit.

Q. As a matter of fact, you wouldn't want it just the same, would you?

A. No.

[fol. 221] Q. You would want it higher?

A. Yes.

Q. That is the best way to have it, right, and that is the way it is here. Is that correct?

A. Yes.

Q. Now, going then back up this pipe, we have got a drop there of about 4 inches in 40 feet, 4 and a fraction, whatever it was; that isn't very much drop, is it?

A. Well, it is adequate.

Q. You think that is adequate, all right. What would be the minimum would you say in 40 feet that would be adequate?

A. About 1/10 would work.

Q. You mean 1/10 of the distance?

A. 1/10 of a foot. That is an inch and a quarter drop would carry the water away.

Q. Does that allow for accumulation of sediment, and so forth?

A. No.

Q. That naturally develops in one of those things?

A. That is assuming the best of conditions.

Q. That is assuming perfect conditions?

A. That's right.

Q. But it is the natural experience, isn't it, where you have drainage like this, that silt and so forth is going to get into your drain pipes?

[fol. 222] A. That's right.

Q. That is the purpose of this manhole, isn't it, to catch that stuff and clean it out every once in a while?

A. That's right.

Q. Well, under these conditions, with silt, and so forth, since you have an open end pipe here coming out of an open ditch, what would you say would be your minimum drop to have a good drainage condition there?

A. I think the slope that you have got there at present is adequate.

Q. That is about right?

A. Yes. It is just a matter of maintenance.

Q. Now, from that end, though, from the end there up to the near end of this water there is how much drop in that open ditch?

A. There is no drop. There is an upgrade of a very slight amount, probably a hundredth of a foot, an upgrade. 96.40 is the end of the swamp area, and 96.41 is the invert. So therefore, the invert is one hundredth of a foot higher than that point in the swamp area.

Q. So that in a distance of what, about 60 feet, you don't have any drop at all?

A. No drop at all.

Q. Now, you suggest, as I understand you, to fill in this area where the water is with slag, to bring th elevation [fol. 223] of the ground up?

A. Yes.

Q. How far would you have to bring the elevation up in order to avoid having water stand there?

Mr. Dudnik: Mr. Neff, I can hardly hear you, sir.

A. I didn't say anything yet.

Mr. Dudnik: I am having a little trouble.

A. Repeat that, please?

Q. How far would you have to bring the elevation up, of this area under the bridge, in order to avoid having water stand there according to your calculations?

A. About 6 inches.

Q. Is your idea, then, that the water from north of here, which goes up to the upper left-hand part of your drawing—

A. Yes.

Q. —would go right over that without stopping there, is that the idea?

A. That's right.

Q. That is your theory, all right.

A. Yes.

Q. Now, the natural drainage direction is from the upper left-hand corner of your drawing here down toward the lower right-hand corner, is that correct?

[fol. 224] A. The slope is in that direction, sir.

Q. That is the natural slope down there in that area, is that correct?

A. It is the slope that we find.

Q. By the way, on this fill proposition, what kind of material did you say you suggested using, slag?

A. I would suggest slag.

Q. What is slag specifically, now, so we understand each other?

A. Slag is a material which is produced by the blast furnaces. It is residue that comes off the material that they use in the manufacture of steel. A very common material which is widely used in fill.

Q. Some of these figures I am not sure of here, if you will excuse me just a moment, while I add something up.

Now, this pipe that goes down drain here, shown here on your drawing, did you make any effort to find out where that went to?

A. No, sir.

Q. Or what it connected into?

A. No.

Q. Mr. Neff, do you know anything about practical railroading, have you ever done any railroad work?

A. Yes, sir.

Q. Would you tell us about that, please?

[fol. 225] A. Well, just recently we did the entire survey of the area in the Warner Road, Turney Road overpass section, for the City of Cleveland, and which is going to eliminate the bottleneck at Turney Road and Warner Road.

Q. That is sort of a bridge across the track?

A. That is an overpass over the Pennsylvania Railroad, which we took elevations of the Pennsylvania Railroad, the drainage situation there, and offered our suggestions and our opinions on what drainage there presently existed, and what they should use for the construction of this proposed cloverleaf and overpass.

Q. If I have the right place in mind, that is composed of a highway overpass over railroad tracks and other area?

A. Yes.

Q. Is that the extent of your railroad knowledge?

A. No.

Q. What else do you have?

A. We have had jobs similar to this where we installed the railroad track, staked out and supervised the installation of a railroad track in Lorain, Ohio, for the New York Central Railroad.

Q. All right. Anything else?

A. Well, those are two that come to my mind at the moment. I think if I dug into my files I could come up with some more.

Q. You don't think of anything else at the moment?

[fol. 226] A. Not at the moment, sir.

Q. What kind of material is this—is is Plaintiff's Exhibit 2—these big blocks here that are on the abutments to the Columbus Road bridge as shown on that exhibit, did you make any inspection of those?

A. Yes. That is stone.

Q. What kind of stone?

A. Limestone.

Q. Actually it is a sandstone, isn't it?

A. Not necessarily. My opinion is it is limestone.

Q. Well, do you know for sure?

A. My opinion is that it is limestone.

Q. You think so, all right. Do you know when that bridge was built?

A. My guess would be about—

Q. I don't want you to guess. Do you know?

A. No, I don't know exactly, sir.

Q. It appears to have been there a good long long time.

A. It appears to have been there a great many years.

Q. Would you be surprised if it had been there before 1900?

Mr. Dudnik: Why don't you tell him? He said he didn't know. Why don't you tell him? There is an objection to that.

Mr. Leasure: I will withdraw that.

[fol. 227] Q. Did you make any effort to find out what the condition was underneath the stone siding of this bridge?

A. No, sir.

Q. Did you make any effort to find what was underneath, did you make any effort to?

A. No.

Q. Did you look at any plans or anything like that that covered the construction of that bridge?

A. No.

Q. Now, I want to get information on one particular point here. You may still look at your blueprint. Take the reference point at the north end of the water area under the bridge, and the point at the south end of that water area, and there is a difference there of .4 of a foot, is that correct?

A. That's right.

Q. So that in this space here, from here to here, we have a drop of .4 of a foot?

A. Yes.

Q. Which would be about 6 inches?

A. No.

Q. 5 inches?
A. No.
Q. What would it be?
A. 4¾.
[fol. 228] Q. Okay, I would still say about 5 in round figures.
A. Yes.
Q. Then the drop from the south end of the bridge down to the beginning of this 10-inch underground tile is negative, isn't it?
A. That's right.
Q. Instead of positive. So we lose .1 of a foot there. .1 is let us say 1 inch?
A. No, it is one hundredth.
Q. .1 of a foot?
A. No. If you will read that, 96.41.
Q. Okay, what does it amount to in inches?
A. One hundredth is an eighth of an inch.
Q. Well, I discount that myself. Can we agree then from the north end of this water to the beginning of the 10-inch drain tile there is a drop of approximately 5 inches?
A. Are you asking me a question?
Q. Yes, I am asking you. To be precise, from here, the west end of the water area down to here, the beginning of the 10-inch drain tile, there is a net drop of approximately 5 inches or slightly less?
A. Slightly less.
Q. A fraction less. 4 and what, about ⅞?
A. About that. About 4¾.

Mr. Leasure: I think that is all.
[fol. 229] The Court: Anything further?
Mr. Dudnik: Just a couple questions, Mr. Neff.

Redirect examination of Cyril W. Neff.

By Mr. Dudnik:

Q. You were asked whether you ever did any work for me. I never met you before last week, had I, Mr. Neff?
A. That's right.

Q. Although I guess we have been in the same building for some time, you didn't know me either, did you?

A. I knew who you were, sir.

Q. We never had spoken, other than maybe say hello?

A. Say hello.

Q. I have just one question. Water can't flow upwards, can it?

A. No, sir.

Q. And this area here is lower than the entrance to the drain pipe, is that right?

A. That's right.

Mr. Dudnik: Thank you, sir. That is all. I have no more questions.

Mr. Leasure: Just a minute.

Recross examination of Cyril W. Neff.

By Mr. Leasure:

Q. That last statement is not correct, is it, sir?

[fol. 230] Mr. Leasure: Will you read the last question and answer?

(Last question and answer was read by the reporter.)

Mr. Leasure: Were you pointing to something when you say this area?

Mr. Dudnik: I mean this area here.

Mr. Leasure: I didn't see what you were pointing to.

By Mr. Leasure:

Q. That statement isn't correct, is it?

A. According to my numbers, it is correct.

Q. Well, I thought you just finished telling me that there was from the west end of this water to the beginning of the drain pipe, there was a drop of 4¾ inches?

A. Yes.

Q. You don't have any readings here for any place between one end of this pool of water and the other, do you?

A. No.

Q. But the readings from one end to the other show that there is a drop within the space of the water there of .4 of a foot, is that correct?

A. Right.

Q. So that the average there is still above the beginning of this 10-inch drain pipe, 2 to 3 inches above, is that [fol. 231] correct?

A. The average would be—you are averaging those two numbers, that is correct arithmetically.

Q. So that the only place where this water is above the level of this drain pipe here is right at the extreme end where it is about an eighth of an inch below?

A. That's right, it is lower.

Q. At that one point only, and that is about an eighth of an inch, is that correct?

A. That's right.

Mr. Leasure: That is all.

Further redirect examination of Cyril W. Neff.

By Mr. Dudnik:

Q. Mr. Neff, I pointed to the area underneath the bridge, that swamp area we are talking about. Is that lower than the pipe or higher, sir?

A. That area there is lower than the pipe.

Q. And is that why it will not flow into the pipe, sir?

A. That is one of the reasons why it won't flow into the pipe.

Q. And could that be eliminated by the filling in of slag that you told us about?

A. Yes, sir.

Mr. Dudnik: Thank you, sir.

[fol. 232] Further recross examination of Cyril W. Neff.

By Mr. Leasure:

Q. Filling in about 6 inches of slag, how do you arrive at the 6 inches, sir?

A. I am computing the proper drainage, and 6 inches would bring that up to an elevation which would give us an adequate slope down to the pipe.

Q. I notice that you made measurements on only one of the rails there along that line of track, is that correct?

A. That's right.

Q. You didn't make any measurements of the line of rail that is next to this area of water, did you?

A. No.

Q. You didn't make any measurements of this line of track right here, did you, the one I am pointing to?

A. The inside?

Q. The inside.

A. No.

Q. The one on the inside of the curve.

A. No. We used the outside rail.

Q. Actually, that track is banked there a little bit, isn't it?

A. It might be.

Q. So that the outside—

A. It might be banked. It doesn't appear to be. It wasn't [fol. 233] enough to be concerned with. All we wanted to do was use the relative elevations.

Q. I am just asking you what you did or didn't do. Now, it is customary, you know from your railroad work, it is customary to bank a curve in the track, a main track, isn't it?

A. On a main track, yes.

Q. And this track goes up to Whiskey Island, or don't you know that?

A. Yes.

Mr. Dudnik: That is not a main track, Mr. Leasure.

Mr. Leasure: Well, I beg to differ with you.

Mr. Dudnik: Fine, sir, all right.

Mr. Leasure: It is.

Q. It is not a siding in a yard, is it?

Mr. Dudnik: It is a single track.

Q. Well, did you make an effort to find out where the track goes from and to?

A. I walked up here, and there is a drawbridge, a lift bridge there at the end where it crosses the river. I walked up there, and I walked down here. I walked probably a quarter of a mile in this direction.

Q. Did Mr. Dudnik tell you that this track right here goes from Clark Avenue up to Whiskey Island, a distance [fol. 234] of about three miles, did he tell you that, this track right here?

A. Perhaps that is true.

Mr. Leasure: I think that is all.

Mr. Dudnik: That is all. Thank you, Mr. Neff. Thank you very much.

The Court: You may step down, sir.

Mr. Leasure: I do have another question of Mr. Neff, I am sorry.

By Mr. Leasure:

Q. Would you mind coming back here? I still have trouble with some of these figures and I think I can determine now what one of these is which I wasn't sure of before. Let me ask you, will you take the stand again?

(Witness resumes the witness chair.)

Q. This relates to the last question I was asking you about the height of the rails there. Let's take what you have here, which is a measurement of the height of this rail here, the outside rail. Let's take a point up here at the north end of the water, and a point opposite to that on the outside rail.

A. Yes.

Q. Now, what is the difference in elevation between those two points?

A. Between those two points?

[fol. 235] Q. Yes.

A. 1.26, which is 1 foot 3 and an eighth.

Q. One foot 3 and an eighth, and how high is the rail above the tie?

A. The rail is approximately 7 inches.

Q. And about how high is the railroad tie?

A. 8 inches.

Q. Will you give me that first measurement again? I didn't get it down.

A. 1 foot 3 and an eighth.

Q. In inches that would be 15½ inches, is that right?

A. Yes, sir.

Q. The rail and the tie would be 15 inches overall, 8 plus 7?

A. Well, that would add up to 15.

Q. So that as that track stands, the bottom of the tie is within an eighth of an inch of the elevation where this water begins?

A. Yes.

Q. Now, let's come down to the east end of this water and give us the elevation of the water and the top rail at that location?

A. Well, the water is 96.4, and the top of the rail is 97.77 which would give you 1.37. That would be 1 foot 4 and a half.

[fol. 236] Q. That would be 16½?

A. That's right.

Q. And the rail and the tie again would be 15 inches, so that would leave an inch and a half?

A. Yes.

Q. Now, can you tell us whether or not that track is banked so that the near rail, the one nearer the water, would be lower than the outside rail?

A. I can't tell you that exactly, sir.

Q. You wouldn't be surprised if it was, from your knowledge of railroading?

A. No. It would be likely.

Mr. Leasure: All right, that is all.

Mr. Dudnik: I am lost. No more questions. Thanks.

The Court: At this time we will adjourn for the noon hour, and you will first return to the jury room, once more with the admonition that you do not talk about this case to anyone, even amongst yourselves.

You will return at 1:30.

(Thereupon an adjournment was taken to 1:30 p.m. on Monday, June 15, 1959, at which time the following proceedings were had:)

[fol. 237]

Monday afternoon session, 1:30 p.m., June 15, 1959

Thereupon JAMES J. GALLICK, the plaintiff herein, further to maintain the issues on his part to be maintained, having been previously sworn, resumed the witness stand and was further examined and testified as follows:

Cross examination of James J. Gallick.

By Mr. Hadden:

Q. Jim, we have a few more questions for you. I will try to keep them just as brief as I can, because I know this isn't very pleasant for you.

I am interested in learning a little bit more about your recollection of the date of your insect bite.

On direct examination I think you said that your best recollection was that it was the 10th of August of 1954?

A. I don't remember.

Q. You don't remember the date?

A. I don't remember. I said it was around the 10th, around the 10th.

Q. Do you remember on your deposition, Jim, two years ago when we took your testimony in the Cleveland Clinic, you said substantially the same thing, but you also said as I recall that it might have been the 11th or 12th of August, but it would be no earlier than August 10th, do you remember that?

[fol. 238] A. Yes.

Q. Is that still your best recollection of the circumstances of it?

A. Yes.

(Defendant's Exhibit G-1 and G-2 were marked for identification by the reporter.)

Q. Jim, I am going to hand you one at a time these two pieces of paper, these are photostatic copies of what purports to be time earnings. I am sorry, I don't have the original, but they seem to be misplaced.

Mr. Dudnik: Could I look at them?

Mr. Hadden: Yes.

Mr. Dudnik: Show them to the Court first.

Q. I am handing you first Defendant's Exhibit G-1, and I would like to have you look at that if you would, and particularly I direct your attention to the lower right-hand corner in the space which appears to contain some signatures, and I will ask you if you recognize any of the signatures there?

A. You mean below mine?

Q. No, I am referring specifically to yours. Do you see your signature there?

A. Yes.

Q. And do you recognize it as being your signature?

[fol. 239] A. That is my signature.

Q. This is a time report which the yard foreman turns in daily at the completion of the run, is that not so?

A. Yes.

Q. And do you recognize that as being a report which you yourself turned in on August 10, 1954?

A. Yes.

Q. Now, I will hand you the other one, Defendant's Exhibit G-2; would you look in the same location, sir, and I will ask you if that is not the same sort of report prepared for the date of August 12, 1954?

A. Yes.

Q. These reports show not only the times that you worked, but the members of the crew with whom you worked, is that not so?

A. Yes.

Mr. Dudnik: May I ask, is that one for the 10th and one for the 12th?

Mr. Hadden: That's right.

Q. And they also indicate, do they not, that you worked as yard foreman on each of those two days?

A. That's right.

Q. Now, handing you Defendant's Exhibit G-1, again,

Mr. Gallick, I will ask you whether in looking at that, whether that piece of paper refreshes your recollection at [fol. 240] all as to the members of the crew who worked with you on the date August 10, 1954?

A. It does not.

Q. It does not refresh you. Are you acquainted with all the gentlemen whose names appear there?

A. Yes.

Q. So the record will show about how many it is we are talking about, that is Mr. William I. Clason, Mr. William Molnar, and Mr. Charles R. Valek?

A. Yes.

Q. Is the same thing true, sir, of the other exhibit, Defendant's Exhibit G-2, that is, you know all the people who are named there, but you are not refreshed as to whether or not they worked with you on that particular day?

A. That's right.

Q. And so we have the record straight on that, they are Mr. William I. Clason, Mr. William Molnar, and Mr. Cloyd W. Stine, is that right?

A. Yes.

Q. Jim, do you know what a Form 790 is as far as the B & O Railroad is concerned?

A. Yes.

Q. That is, is it not, a report form which is required to be made out by any employee who is injured on duty?

A. That's right.

[fol. 241] Q. What can you say, sir, as to whether or not a report Form 790 was made out in connection with your insect bite?

A. There wasn't any.

Q. There was none.

Mr. Dudnik: Beg pardon?

A. Can I say something?

Mr. Dudnik: No, Jim. Wait until you are asked. Later on if you want to say something it is all right, but I suggest that you wait until you have answered his questions.

Mr. Hadden: Mark this, please.

(Defendant's Exhibit H was marked for identification by the reporter.)

Q. Jim, I hand you what has been marked Defendant's Exhibit H; it is a printed form with some typewriting on it, in the upper right-hand corner it has in small type the words form 790. That, so far as the printed form is concerned, is the kind of report we have just been talking about, is that not so?

A. Yes.

Q. Now, I will ask you to look at that briefly. Looking at the lower right-hand corner which your typed name appears, and also after the words "Person injured," and your name also appears there, that appears, does it not, sir, to be a report prepared with reference to your insect bite, does it not?

[fol. 242] A. Yes.

Q. Do you have any knowledge, sir, as to how that report came in existence?

A. No, I don't.

Q. Did anyone from the railroad ever contact you with regard to the circumstances of your insect bite on the date or prior to the date of this report, which is October 20, 1954, at which time you already were in the hospital?

A. Yes. At that time, Spinelli and Robinson.

Q. Mr. Spinelli and Mr. Robinson had already been in touch with you, had they?

A. Yes.

Q. Is that by way of a visit to the hospital?

A. Visit to the hospital.

Q. You yourself never filled out one of these report forms in your own handwriting, is that right?

A. No.

Q. Excuse me, go ahead.

A. Because Spinelli told me it wasn't required to make out a 790 on an insect bite.

Q. I see. At least so far as you are aware you had nothing to do with the preparation of this report?

A. No, I did not.

Q. And you never saw anybody else prepare it, a report covering this matter?

[fol. 243] A. No.

Q. Neither Mr. Spinelli or Mr. Robinson?

A. No.

Q. While we are talking about Mr. Spinelli, Mr. Gallick, you knew him prior to any events that had anything to do with your insect bite, didn't you?

A. Yes, sir.

Q. Did you know him fairly well?

A. Yes.

Q. What was your opinion of Mr. Spinelli?

Mr. Dudnik: Objection as to what his opinion was of the claim agent.

Q. Was it your experience that Mr. Spinelli always dealt with you fairly?

Mr. Dudnik: Objection. What he did in the past has nothing to do with this situation, your Honor, if he did, I don't know. There is an objection.

Mr. Hadden: I will lay the foundation for it, your Honor.

Mark this.

(Defendant's Exhibit I-1 and I-2 were marked for identification by the reporter.)

Q. Jim, I am going to hand you another piece of paper which has been marked Defendant's Exhibit I-1 on one side, [fol. 244] and I-2 on the other side by the reporter.

It also has been marked in the lower right-hand corner Defendant's Exhibit A which was marked that way at your deposition at the Cleveland Clinic two years ago.

I will hand you that, Jim, and ask you to look at it, please, and I want you to look particularly at the bottom of each page where there appears to be a signature which is your signature?

A. It is my signature.

Q. And do you recognize that piece of paper, sir?

A. I can't see—

Q. You do, however, recognize your signature?

A. Yes.

Q. You are looking at one side of it, being the front of it; I will turn it over for you and show you the other side, and I will show you the bottom line in the lower right hand corner, is that also your signature there?

A. Yes.

Q. Now, I think you testified on direct examination that Mr. Spinelli and Mr. Robinson came to see you while you were in the hospital?

A. Yes.

Q. At Marymount?

A. At Marymount.

Q. And that a statement was taken?

[fol. 245] A. Yes.

Q. Are you able to say, sir, by looking at that whether or not this is the piece of paper?

A. No.

Q. You are not able to say?

A. No.

Q. Do you recall, sir, my having shown this to you and I believe having permitted you to read it over when we took your deposition at the Clinic two years ago?

A. No, I don't.

Q. Well, so that we can have the record show what your recollection as to this is, I wonder if you will read it over to yourself at the present time, and satisfy yourself as to whether or not that is the statement which was signed by you in the presence of Mr. Spinelli and Mr. Robinson at Marymount Hospital.

You don't have to read it all the way through, if you become satisfied that it is that statement.

A. Well, right here I don't remember—

Mr. Dudnik: No, Jim. I think he wants to know whether this is the paper you signed for the claim agents if you recall that it is.

A. Yes, it is.

Mr. Dudnik: That is all he wants to know.

[fol. 246] Q. That is all I want to know. Thank you.

Do you recall telling me in the course of your deposition, Jim, that the contents of this statement which you signed in Marymount Hospital was true and correct in accordance with your best recollection at the time we took your deposition in August of 1957?

A. No, I don't.

Q. You don't recall saying that?

A. No.

Q. I will read you one or two questions and answers, sir, from that deposition, and see if this will refresh you, from Page 89.

Mr. Dudnik: Just a minute, please. Page 89? All right.

Mr. Hadden: Near the bottom.

Q. This question was asked: "Well, this statement, Defendant's Exhibit A, is the statement that you made, is that right?

"A. Yes.

"Q. This is your signature?

"A. That is my signature.

"Q. On the bottom part of it?

"A. Yes."

I am going over to the bottom of Page 90.

[fol. 247] "Q. You do remember signing it?

"A. Yes.

"Q. And as far as you recall it was correct and represented your best memory at the time?

"A. Yes, at the time."

Do you remember those questions and answers, Jim?

A. No, I don't.

The Court: What was that answer?

Mr. Hadden: No, he does not.

Q. You don't deny that you did make those answers to those questions, do you?

A. I don't remember that I did.

Q. Well, if the record shows that that is what you said, you have no reason to dispute it, have you?

A. Yes.

Q. You mean that is correct, is that right?

A. Yes.

Q. So far as the crew with whom you worked on the date of this occurrence is concerned, Mr. Gallick, I think you said on direct examination that after you had been bitten you mentioned the fact to someone who was on the footboard, is that right?

A. On the front footboard.

Q. On the front footboard of a locomotive; was the man to whom you made that remark a member of your crew on that day?

[fol. 248] A. He was.

Q. Then so that we have it entirely clear, when you testified on direct examination that you didn't know who that was, you didn't mean to say that you weren't acquainted with that man, it was merely that you do not remember who it was, is that right?

A. I don't remember who it was.

Q. But you were acquainted with all the men who worked with you?

A. Yes.

Q. Jim, when was it that you first tried to recall and fix in your own mind the date of the insect bite?

A. Around the 10th.

Q. I guess I haven't made the question entirely clear to you. I think you testified on direct examination that there were a number of days that went by after you were bitten, during which you didn't give it any particular thought, because it didn't seem serious to you.

I am trying to find out how many days did go by before you did first begin to be concerned about it, and you first tried to fix the day.

A. Well, I wouldn't know for sure.

Q. I appreciate that. But can you give us some approximation of how long that was? Was it a matter of a week or perhaps two weeks?

[fol. 249] A. No, it was I would say close to a week.

Q. About a week, and was it about that time also that you first tried to remember when it took place?

A. No, I tried to remember after I seen Robinson and Spinelli.

Q. At the hospital?
A. At the hospital.
Q. Did they visit you once or more than once?
A. I think it was more than once.
Q. Do you recall the time book that was shown to you by Mr. Dudnik last week, do you not?
A. Yes.

Mr. Hadden: Has this been marked?
Mr. Dudnik: Yes.
Mr. Hadden: Plaintiff's Exhibit 11.

Q. I think you testified on direct examination as to when it was that the word bug was put in here opposite the date of August 10th?
A. Yes.
Q. Just so that I have it clearly in mind, was that at about the time that Mr. Robinson and Mr. Spinelli came to see you that you put that word in there?
A. Yes, I believe it was.
Q. And that was the first occasion when you had any reason to attempt to fix in your own mind what day it was that [fol. 250] the insect bit you?
A. Yes.
Q. Was that the same day on which the written statement was taken, do you recall?
A. No, I don't recall.
Q. You don't remember. But at any rate, it was after you were in the hospital, and it was thus something like over a month since the time of the accident?
A. Yes.
Q. Or the injury or insect bite or whatever it can be called. Jim, when we finished up last Friday we were talking about—excuse me, do you want to take a break?
A. No, no.
Q. When we suspended last Thursday we were talking generally about the conditions around the right-of-way under the Columbus Road bridge, and in that vicinity, and we had talked at some length about the dead and dying pigeons which you described as having been there.

Now, with reference to that same general area and the area where you were bit, what can you tell me as to the

quantity of dead rats which you might have seen at any one given time under the Columbus Road bridge?

A. Well, I wouldn't know because I never counted, I never counted them.

Q. No, of course not. Is it a fact that there were some [fol. 251] dead rats there at all times?

A. Yes.

Q. Would it be something more than one at all times?

A. At all times.

Q. Again, without attempting to pin you down in any way, can you give us an expression of approximately the number that were involved?

A. (No answer.)

Q. Would it have been as many as 10?

A. Well, I don't know, but that would be closer to it.

Q. It would be closer to 10 than to 1, is that it?

A. There was dead rats and the hides of dead rats laying in there, dead pigeons, and the hide, the shell, of the dead pigeons.

Q. If you will just do this for us now, restrict yourself to the rats. We talked about the pigeons before.

If I understand you correctly, you are saying that 10 dead rats would not be too far out of line?

A. Could be 10, could be more.

Q. Is that, sir, your best estimate as to the number of dead rats immediately underneath the bridge?

A. Yes.

Q. And it would be safe to say, then, that there were others that could be found in both directions from the bridge, is that right?

[fol. 252] A. Yes, that's right.

Q. And would the area in which those could be found be pretty much the same as the area that you described last Thursday where the pigeons were found?

A. Yes, you know, laying on, laying around.

Q. And they would extend down as far south as the overhead bridge of the Sherwin-Williams plant?

A. Not quite as far as that. I would say to the Sherwin-Williams plant.

Q. Was it the same general area as the pigeons were found, or were the rats somewhat more restricted in the places that they might be found?

A. They were more restricted there.

Q. In other words, there were more pigeons than there were rats?

A. No, not more. The most, the worst was underneath the Columbus Road bridge, that's what.

Q. But they were found also down to the south?

A. Yes.

Q. Substantially towards where the Sherwin-Williams plant is?

A. Yes.

Q. Now, let's direct our attention for a moment to the insects which you recall having seen there, and I am referring for the purposes of this question to the insects which [fol. 253] you observed prior to the day on which you were bitten.

Mr. Dudnik: Where, Mr. Hadden? Where?

Mr. Hadden: I will get to it.

Q. First, with reference to the same area right underneath the Columbus Road bridge, under which you say you were bit, are you able at this time to recall and describe for us any of the different kinds of insects or bugs which you saw?

A. How could I describe them?

Q. Well, I just want to find out, if you can't describe them—

A. No. They crawled, they flew.

Q. Well, you are familiar of course, as we are all, with the various usual types of insects in this vicinity, mosquitoes?

A. I know mosquitoes, flies.

Q. Mosquitoes, flies. Were there any other kinds, names of insects that you can give us?

A. Yes. Many. Oh, no, not the names that I could give you. But there was other.

Q. Other types?

A. Other types.

Q. What can you say—I am trying to get some idea of what types these were—can you describe any one of them with any greater degree of precision?

[fol. 254] A. I know nothing about insects.

Q. Well, we are all going to learn a little bit about them in the course of this I guess. How about the sizes of any of the other insects, can you remember how big any of the other ones were that you saw?

A. No. They varied in sizes, too.

Q. They would both crawling varieties?

A. Yes.

Q. And varieties with wings?

A. Yes, flying, yes.

Q. Do you know anything about the colors of them?

A. No.

Q. Do you recall having seen Canadian Soldiers in the vicinity of the bridge from time to time?

A. Yes.

Q. Any gnats?

A. Well, I just don't know what a gnat is.

Q. It is a fact, isn't it, that you never saw anything under the bridge, under the Columbus Road bridge, before the insect bite that looked anything like the one that you felt when you snapped at your pant leg, isn't that so?

A. I don't know because I don't know what it was that I felt.

Q. Do you recall, you were able to describe the size of it, weren't you, on your direct examination?

[fol. 255] A. Yes.

Q. It was about 2 inches long and about half an inch in diameter?

A. Yes.

Q. Do you recall ever having seen under the bridge anything that looked as you have described the insect felt?

A. Well, I have seen that size crawling on these dead hides.

Q. You have?

A. I have.

Q. I want to read you one question and one answer that you gave in your deposition again, Jim. Page 76.

Mr. Dudnik: Line?

Mr. Hadden: I don't have the numbers on mine. About a quarter of the way down the page.

Q. At your deposition in a Clinic two years ago I asked you this question and you made an answer that I will read to you.

"Q. Did you ever see anything that looked like what this thing in your pant leg felt like?

"A. No."

Do you recall that question?

Mr. Dudnik: Just a moment, please. Read the whole [fol. 256] answer. Show the dashes where you interrupt him with another question, please.

Mr. Hadden: All right.

Q. You said, the question again:

"Did you ever see anything that looked like what this thing in your pant leg felt like?

"A. No. I couldn't. And then I—"

Mr. Dudnik: Dash, Dash.

Mr. Hadden: Well, he didn't say dash dash.

Mr. Dudnik: You know what that means, don't you?

Mr. Hadden: Let's read the question that is printed on the page.

Mr. Dudnik: What does dash dash mean to you?

Mr. Hadden: I interrupted him with a question apparently.

Mr. Dudnik: That is all I asked you.

Q. "Well, would it be fair to say that the insects which you did see on prior occasions and perhaps on this day as well were flies, spiders, and the ordinary?"

And then you interrupted me with an answer, "Yes, different various kinds, different kinds."

[fol. 257] Do you recall those questions and answers, Jim?

A. Yes.

Q. Well, are we to understand that you can now recall having seen insects of the size that you felt in your pant leg?

A. No, I don't know nothing about that. I have seen various sizes, and about the size that I felt in my pants leg.

Q. You now do remember having seen insects on the ground—

A. Yes, I seen.

Q. Before the date of your bite?

A. Yes.

Q. Of the size which you felt.

The Court: Are you having any trouble hearing?

Mr. Dudnik: You are, Jim. I will have to move you a little closer. Jim, would this be better for you? How is that?

Q. Do you mind if I stand here where I can't really see you?

A. No, that's all right.

Q. You can hear me all right. I will read you one more question, Jim.

Following those which I have already read there is a question, "In any case, you never did see anything that looked like the way the one that bit you felt;"

[fol. 258] And you answered "No."

And there were no dashes or anything after that answer. You do remember making those answers, do you, Jim, two years ago?

A. Yes.

Q. All right. Just a few more questions. You testified, Jim, that you made some complaints to Paul Delaria, the track foreman, before this occasion?

A. That's right.

Q. Now, this may be difficult for you, but I want you to try as much as you can to recall the circumstances of those conversations that you had with Mr. Delaria.

First of all, do you recall how often it was that you mentioned the conditions to Mr. Delaria?

A. At least twice I asked him why he can't clean up the dead rats and the dead pigeons.

Q. Your remark to him was with specific reference, was it, to dead rats and dead pigeons?

A. That's right.

Q. Do you remember where it was you had these discussions with him?

A. No, I don't remember where it was, but it was on the right-of-way.

Q. It was while both of you were at work?

A. We were working, yes, sir.

[fol. 259] Q. Was it in the neighborhood of the Columbus Road bridge?

A. I think—

Mr. Dudnik: You mean where you had the conversation?

Mr. Hadden: Yes.

A. Yes, it was around there someplace.

Q. Well, you are somewhat vague in your mind as to where exactly it was, are you not?

A. At one time I know it was at West Street.

Q. At West Street?

A. At West Street.

Q. And by West Street you refer to the team track?

A. Team track.

Q. Located at West Street?

A. Yes.

Q. And that was the place where you had one of these conversations with Mr. Delaria?

A. Yes.

Q. What did you say by way of indicating to him what area you were referring to?

A. Well, he knew what area I was referring to.

Q. Well, what area were you referring to?

A. Columbus Road bridge and south of it.

Q. Do you recall having mentioned that area specifically to Mr. Delaria?

[fol. 260] A. Yes. He knew exactly what I was talking about.

Q. Well, I am asking you exactly what it was that you said, not what you think he might have known.

A. I asked him if he couldn't clean it up, have it cleaned up by his men.

Q. The point I am trying to get at specifically is did you mention any specific area to him when you had this conversation?

A. Yes, he—

Q. You did mention it?

A. I mentioned it, yes.

Q. Now, that is as to the conversation that you had with him at West Street?

A. At West Street.

Q. There was another conversation, was there, someplace else?

A. Yes, there was another conversation someplace else.

Q. What can you recall as to what you said to him on that occasion?

A. The same thing. I asked him if he please wouldn't clean it up or have it cleaned up.

Q. And did you mention the same general area to him on that occasion?

A. The same general area.

Q. Is that about the sum and substance of what you can recall of these two conversations that you had with Mr. Delaria?

[fol. 261] A. Yes. And I made one complaint to—at the freight house.

Q. One complaint at the freight house?

A. At the freight house.

Q. To someone other than Mr. Delaria?

A. Yes.

Q. Before we get to that one, let's make sure we have it straight about the conversations that you had with him. As I understand it, you have told us everything that you can recall at the present time about what you said to him on both of those occasions, is that right?

A. Yes.

Q. Now, how about the complaint made—pardon me—can you remember when it was that you had those two conversations?

A. No, I don't.

Q. Do you remember how far apart they were in point of time?

A. Well, they were about a month, month and a half apart.

Q. Do you remember how long previous to the incident of your insect bite?

A. No.

Q. You have no recollection about that at all?

A. No, I don't remember.

Q. How about then a conversation or complaint as you call it at the freight house, do you remember who it was?

A. Yes, it was Art, the foreman.

[fol. 262] Q. Art, the foreman?

A. Yes.

Q. Is his last name Thomas, by any chance?

A. I think it is.

Q. Art Thomas?

A. I think it is.

Q. Tell us everything you can remember about that, then, will you?

A. I complained about West Street to him, because his men—

Q. Wait a minute. Did your conversation with him have anything to do with the Columbus Road bridge area?

A. No. He had nothing to do with that area.

Q. Did he have something to do with West Street?

A. He did.

Q. Do you know of anyone else by whom complaints were made to anyone in connection with the B & O Railroad with respect to the conditions under the Columbus Road bridge, at any time?

A. Do I know—what was that question?

Mr. Hadden: Do you want to read it to him? If it isn't clear I will rephrase it.

(Last question read by the reporter.)

Q. Do you understand that or should I ask it again?

A. No, I wouldn't know of anyone—

Q. Of anyone else?

A. Of anyone else.

[fol. 263] The Court: I didn't hear the answer.

Mr. Hadden: He wouldn't know of anyone else.

Q. In so far as the bite itself is concerned that you experienced under the bridge or in that vicinity as you

claim, how would you say that would be best described, as a bite or a sting?

A. Well, I would say a bite.

Q. A bite as opposed to a sting say from a hornet or a wasp or something of that order?

A. Yes.

Q. Did it feel at all like a mosquito bite?

A. Mosquito bite?

Q. I am not trying to lead you astray. I am merely trying to find out as best I can what happened to you.

A. Mosquito bite?

Q. Did you ever have another bite or sting or whatever it might have been that felt something like this?

A. Yes—no, not like this.

Q. You never did?

A. No.

Q. Is there any description that you can give us that will help us to understand just how it was that this incident [fol. 264] felt?

A. The only description, the description that I gave.

Q. Only what you have already told us.

Mr. Hadden: I think that is all.

Redirect examination of James J. Gallick.

By Mr. Dudnik:

Q. Jim, I have just a few questions that I would like to ask you.

Offers in Evidence

Mr. Dudnik: First I would like to offer those exhibits, I want to offer them in evidence, Mr. Hadden, if I may.

I offer into evidence, if your Honor please, Defendant's Exhibit H. May I have the others, please?

I offer into evidence Defendant's Exhibit G-1, I offer into evidence Defendant's Exhibit G-2, and I offer into evidence the statements signed by Mr. Gallick, Defendant's Exhibits I-1 and I-2.

Mr. Hadden: Your Honor, before we have a ruling on that, may I have a chance to talk to Mr. Leasure? May I see them a minute, please?

Mr. Dudnik: Surely.

The Court: Without objection, Defendant's Exhibit G-1 [fol. 265] and G-2, H, and I-1 and I-2 are received into evidence.

Mr. Dudnik: Your Honor, the one exhibit which is the statement is identified as Defendant's Exhibit I-1 and I-2. For the record I want to make that correction.

The Court: It will be received.

By Mr. Dudnik:

Q. Jim, this Form 790 was not made out by you, was it, Jim?

A. No.

Q. It says, however—now that it is in evidence—nature and extent of injury: Insect bite back of left leg at knee joint, does it not, Jim?

A. Yes.

Q. And that is on Baltimore and Ohio Railroad form, is it not?

A. Yes, sir.

Q. Did you do this?

A. No, I didn't do that.

Q. It says further: "Continued working until September 12th under care of family physician. Hospitalized September 18th on orders of family physician, due to infection setting in."

Does it not say that, Jim?

A. That's right.

Q. It says: "Remarks: Walking along Lime Road to [fol. 266] West Street team track under Columbus Road bridge when I was bitten by insect inside pant leg." Does it say that, Jim?

A. Yes.

Q. Now, let's go over the statement, Jim. This is the one you admitted signing, and apparently it was on the second day of November, 1954, from here.

Do you remember who was there when you signed it?

A. Spinelli and Robinson.

Q. Are they both claim agents for the B & O Railroad?

A. Claim agents for the B & O Railroad.

Q. Were they both there?
A. They were both there.
Q. Did you write it or did they write it?
A. They—they wrote it.
Q. Do you know which of the two wrote it?
A. No, I don't. I can't say for sure.
Q. Was anybody there with you besides those two men?
A. No.
Q. Was this after your surgery?
A. Yes.
Q. Now, let's read this, Jim. It says here, "I have been in the B & O service since 1944." Did you say that?
A. That's right.
Q. "On August 10, 1954, I was working my regular job, Cleveland yard job number 2, second trick, as yard foreman."
[fol. 267] Do you recall whether you said that or not?
A. Yes.
Q. "The weather was hot, clear and dry."
Is that correct?
A. Yes.
Q. "My engine was in the number 8 track of the spur yard where it had shoved some cars and was coming out light, and I had given the engineer instructions to go to the river track and do some switching."
Is that right, Jim?
A. That's not right.
Q. Would you have said that?
A. No, I wouldn't have said that.
Q. Was that a fact, Jim?
A. No, it wasn't a fact.
Q. "While the engine was coming around I walked from the number 8 track over to the West Street team track to check the cars."
Did you do that, Jim?
A. No. I walked across Lime Road to the river track.
Q. Would you have said that?
A. No, I wouldn't have said that.

Q. All right. "I was walking on the left side of the passing siding going west and was directly underneath the Columbus Road bridge."

[fol. 268] What is the passing siding, Jim?

A. I don't know.

Q. Did you ever call that river track the passing siding?

A. No, I just was going to say—

Q. Did you say this, Jim?

A. No, I did not say that.

Q. "When suddenly I felt something sting or bite my left leg just about four inches above my knee on the back side of my leg, more to the outside."

Is that what happened, Jim, did you say that?

A. I wouldn't say to the outside because it was on the back of the leg.

Q. "I was wearing khaki trousers and when I felt the bite or sting I struck at it, could feel what felt like a large bug or insect."

Is that correct, Jim?

A. That's right.

Q. "I couldn't see it as it was inside my trouser leg."

Is that correct?

A. That's right.

Q. "But I could get hold of it through my trousers with my fingers, and squeezed it, and I heard and felt it pop under the pressure."

Is that correct?

A. Thats' right.

[fol. 269] Q. "After this occurred I could still feel the effect of it and it felt like an insect bite."

Is that correct, Jim?

A. Yes.

Q. "I remarked to my brakeman, Molnar, shortly after that, that I had gotten a bite."

Now, is that correct, Jim?

A. No, it isn't, because I don't know who the man was that I referred to. But I—

Q. Do you remember now whether it was or was not Molnar?

A. I don't think it was Molnar.

Q. You do not think it was Molnar.

"I went ahead with my work and when I got home I told my wife about it."

Is that correct, Jim?

A. That's right.

Q. "At that time it appeared to look like a mosquito bite with a small speck, white in color, in the center, with some swelling around it."

Is that correct, Jim?

A. Yes.

Q. "I had never had any skin eruptions and had had no injury in this area at any time, and this bite or sting was on a normal area of my skin."

Is that correct, Jim?

[fol. 270] A. Yes.

Q. "I had no idea what it was that bit me except that it felt like a bug. About three days later my wife told me that the bite was gathering like a boil."

Is that correct, Jim?

A. That's right.

Mr. Leasure: Now just a moment. I think I will object to these questions, "Is that correct," unless it is made clear as to whether the witness is answering that that is what he put in his statement, or whether it isn't.

Now, if it isn't, if that isn't what is being asked, I am objecting because this thing then is being used as a—

Mr. Dudnik: I am reading the statement that your claim agent took.

The Court: Counsel may read the statement. He may read it in its entirety or any part of it.

Mr. Leasure: Yes, but my point is that the question is not specific as to whether the witness is being asked if that is what he told the claim agent.

Mr. Dudnik: Well, I will make it clear from here on in.

[fol. 271] Mr. Leasure: All right, make it clear.

Q. "While at work on August 18th the sore began to drain, and I noticed it that day when I got home."

Did you tell that to the claim agent?

A. No.

Q. "On the next day I saw Dr. Heller who treated me," did you tell that to the claim agent?

A. No, I didn't say that.

Q. "I worked through September 11th when upon the advice of Dr. Heller I laid off."

Did you tell that to the claim agent?

A. No.

Q. "Dr. Heller didn't seem to be curing me, and I went to Dr. Ippolito on or about the 16th."

Did you tell him that?

A. Yes.

Q. "By that time the sore was bigger than a silver dollar, and he had me hospitalized at Marymount where I have been ever since."

Did you tell him that?

A. Yes.

Q. "At the time I got the bite I was walking along the path besides the track where we had to walk in the course of our work."

[fol. 272] Did you tell him that?

A. No, I didn't tell him that.

Q. "The pathway was clean, but the properties adjacent to the track in that vicinity owned by Sherwin-Williams and Mau-Sherwood is filthy with dead rats and pigeons."

Did you tell him that, Jim?

Mr. Hadden: Excuse me. You left out some words in reading the statement.

Mr. Dudnik: Let me get it if I did. Where did I leave them out? Let's start again.

Q. "The pathway was clean, but the properties adjacent to the track in that vicinity owned by Sherwin-Williams and Mau-Sherwood and others is filthy with dead rats and pigeons which have been poisoned and died around there."

Did you tell that to the claim agent?

A. No, I didn't tell them that because I don't know who owns the properties.

Q. Did you have any idea who owned the property adjacent to Mau-Sherwood?

A. No, I didn't.

Q. Or to the Sherwin-Williams?

A. Nor the Sherwin-Williams.

Q. "I believe that such unsanitary conditions tend to draw [fol. 273] various kinds of bugs."

Do you recall whether or not you said that?

A. No, I don't remember saying that.

Q. "From time to time I have noticed that I am frequently swatting one kind of insect or another, particularly in the neighborhood of Lime Road and West Street."

Did you tell them that, Jim?

A. No.

Q. "I can add nothing further to the cause of my trouble than what I have already said."

Is there anything in that statement about the ditch underneath the Columbus Road bridge, is there, Jim?

Mr. Leasure: I object. I object to the question. The document speaks for itself. It has been fully read.

The Court: The question will go out.

Q. Did you tell that claim agent anything about the ditch under the Columbus Road bridge?

A. I told them but he didn't say anything about Columbus Road bridge.

Q. Did you tell him that?

A. Yes, I did.

Q. And what did he say to you?

A. Don't worry, that was left out but it will be taken [fol. 274] care of.

Q. What else did he say to you?

The Court: May I have the answer?

Mr. Dudnik: "Don't worry, it was left out but it will be taken care of."

Q. What else did he say to you?

A. He said—

Q. I can't hear you, Jim. Can you answer one more question?

A. Yes.

Q. What else did he say to you, Jim?

A. He told me I would be taken care of.

Mr. Leasure: Just a moment.

Q. That you would be taken care of?

Mr. Leasure: I heard enough to object right now.

A. He told me that I would be taken care of.

Mr. Leasure: Just a moment. I am objecting to the question in the first place, without any answer, and I certainly object to the answer, the part that got out.

The Court: Will the reporter read the question?

(Following question was read by the reporter: "What else did he say to you, Jim?")

Mr. Dudnik: That is the question.

[fol. 275] Am I permitted to show the circumstances surrounding the taking of that statement?

The Court: He may answer the question.

Q. What is your answer?

A. He said that I would be taken care of, that I shouldn't worry about it.

Q. What else did he say, if anything?

Mr. Leasure: I think I will object to that. He hasn't indicated that he said anything else.

The Court: Objection to the form of the last question will be sustained.

Q. Can you remember anything else that he said?

Mr. Leasure: I am still objecting, your Honor.

The Court: Overruled.

A. No.

The Court: What was the answer?

Mr. Dudnik: "No, I don't remember."

No more questions.

The Court: Mr. Hadden, are you going to inquire further?

Mr. Hadden: I was inquiring if he wants to take a break.

[fol. 276] Mr. Dudnik: Are you going to ask him some further questions? If not—

Mr. Hadden: Just a second.

We have no further questions.

Mr. Dudnik: No further questions. Thank you, Jim.

The Court: At this time, ladies and gentlemen of the jury there will be a short recess and you may return to the jury

room, once more with the admonition that you do not talk about this case with anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

[fol. 277] Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness Dr. Victor Ippolito, who, being first duly sworn, was examined and testified as follows:

Direct examination of Dr. Victor Ippolito.

By Mr. Dudnik:

(Plaintiff's Exhibits 13 and 14 were marked for identification by the reporter.)

Offers in Evidence

Mr. Dudnik: If your Honor please, at this time I should like to offer into evidence Plaintiff's Exhibit 13, which is the Marymount Hospital record of the first admission.

The Court: Marymount Hospital records?

Mr. Dudnik: Yes, for admission of September 18, 1954—Doctor, you tell me the date of discharge.

The Court: Have these been shown to counsel?

Mr. Dudnik: Yes.

The Witness: Admitted September 18, 1954.

Mr. Dudnik: Does it show the discharge?

The Witness: No. Usually they have it written right [fol. 278] there.

Mr. Leasure: What are those dates?

Mr. Dudnik: Admission, September 18, 1954. We are just getting the discharge date.

The Witness: He was discharged December 8.

Mr. Dudnik: '54?

The Witness: '54. Home tomorrow. That is signed on the 7th.

The Court: Without objection—

Mr. Leasure: Well, just a moment, if your Honor please. I think I will object to the wholesale introduction of them into evidence.

We have no objection to the identity of the records themselves; in other words, we are not insisting that the librarian be called down here to identify them.

But I am sure that there are at least some parts of the record which are inadmissible per se. Perhaps other parts are admissible.

The Court: Have you gone over the records?

Mr. Dudnik: Your Honor, I will not argue that at the moment.

Then I would like to offer also the next admission, the [fol. 279] next hospital record on the second admission, and if the Court will withhold ruling on them we will try to go over them and see what we can agree on. In the meantime I would like to have the Doctor—

The Court: The other will be Plaintiff's Exhibit 14?

Mr. Dudnik: Plaintiff's Exhibit 14 which is the Marymount Hospital record from the admission of—

The Court: The second admission?

Mr. Dudnik: Yes, the second admission.

The Witness: January 4, 1955. Discharged March 8, 1956.

The Court: The Court will withhold ruling.

Direct examination of Dr. Victor Ippolito.

By Mr. Dudnik:

Q. Doctor, you may refer to these if you have to in your testimony. Dr. Ippolito, will you please state your name in full?

A. Victor D. Ippolito, M.D.

Q. How do you spell your last name?

A. I-p-p-o-l-i-t-o.

[fol. 280] Q. Where do you live, Doctor?

A. 24100 Laureldale, Shaker Heights 22, Ohio.

Q. Are you a licensed practicing physician and surgeon in this community?

A. Yes, sir.

Q. Where are your offices?

A. 11710 Shaker Boulevard, Cleveland, Ohio.

Q. Doctor, where did you study medicine?

A. Western Reserve University.

Q. When were you admitted to the practice of medicine?

A. 1939.

Q. Following your graduation from the University did you intern in any hospital?

A. Yes, I spent four years at St. Vincent's Charity Hospital here in Cleveland.

Q. Four years?

A. Yes, sir.

Q. In what capacity?

A. The first year I was an intern, and then the second year I took a year of internal medicine, and then after that I was the surgical resident. My last year I was chief resident in surgery.

Q. When did you leave the hospital, St. Vincent's Charity Hospital?

A. 1943.

[fol. 281] Q. Following that what did you do, Doctor?

A. I went into practice at the Rose Building.

Q. And have you been continuously engaged in the practice of medicine since 1943?

A. Yes, sir.

Q. Doctor, are you a member of any medical society?

A. American College of Surgery, International College of Surgery, Academy of Medicine, Medical Library.

Q. Doctor, are you connected in any manner with any hospitals in this community?

A. Yes. I am secretary of the executive staff at Marymount Hospital, and I have privileges at St. Vincent's Charity and also at St. John's Hospital.

Q. You operate at St. Vincent's Charity Hospital?

A. Yes.

Q. And at St. John's?

A. I haven't gone to St. John's in a number of years, but, if I want to I can, yes, sir.

Q. Where do you do most of your surgery, Doctor?

A. About 95 per cent at Marymount Hospital.

Q. Are you also, Doctor, the club physician for the Cleveland Browns football team?

A. Yes.

Q. How long have you been that?

A. Since they started, about four years.

[fol. 282] Q. Doctor, I will ask you if you had occasion to see the plaintiff in this case, James Gallick, professionally?

A. Yes, sir.

Q. Can you tell me when you first saw him?

A. May I look at this, please?

Q. Yes, you can refer to all the records you have.

A. I saw him September 16, 1954. At that time I was in the Rose Building.

Q. In the Rose Building?

A. Yes, sir.

Q. Did you see him at your office?

A. Yes, sir.

Q. Did you at that time receive a history of his having had an accident?

A. Yes, sir, he gave me a history, yes, sir.

Q. What was that history, Doctor?

A. He stated that about a month before coming to my office he had an insect bite, and here I have, "in the right popliteal area," which is the back of the knee area.

Q. At that time, Doctor, following that history, did you perform an examination?

A. Yes, sir.

Q. What area did you examine?

A. I examined the area behind his leg in which he had a large ulcer. It was a necrotic foul-smelling ulcer behind [fol. 283] his knee and the back part of his leg.

Q. What is the meaning of the word necrotic, Doctor?

A. Necrotic means dead, dead tissue, not healthy tissue.

Q. Can you call an ulcer a lesion?

A. Yes, sir.

Q. What is a lesion, Doctor?

A. Well, a lesion is any disruption of the skin. It doesn't even have to be a disruption. Anything that is abnormal, that is not normal.

Even a tumor mass that doesn't have the skin broken, we can still call that a lesion, but it depends on what type.

Q. When you examined him that day did he have one or more than one lesion?

A. Just one.

Q. And did you examine his body besides that area?

A. Yes, yes, sir.

Q. Following that examination, Doctor, what did you do?

A. He was admitted to the hospital immediately, the same day.

Q. What hospital?

A. Marymount Hospital in Garfield Heights, Ohio.

Q. Doctor, I believe you said that your record shows the right leg. Is that correct or incorrect?

A. No, that is a mistake. I should have written left leg, but I put down right leg.

[fol. 284] Q. Whose mistake is that, Doctor?

A. Mine.

Q. Beg pardon?

A. My mistake. I wrote it.

Q. Doctor, when he was admitted to the hospital was he admitted as your patient?

A. Yes, sir.

Q. And from the first day of his admission tell me what you did and what you observed, and the course that he took?

A. Well, from the first day that he was admitted, of course, we take the usual blood test that we do on all patients.

Q. What is the purpose of that, Doctor?

A. It is to rule out any other diseases, systemic diseases, to know whether the man is anemic, whether he is not, whether he has a blood stream infection, a lot of reasons, whether he has diabetes.

A lot of times urine doesn't show it and you have to do blood tests to ascertain whether a man has diabetes or not. His urine may be negative but still he has diabetes.

Q. Is it fair to state, then, that your first objective was to rule out certain conditions?

A. Yes, sir.

Q. Now, did you make any tests then for you said diabetes?

[fol. 285] A. Yes, sir.

Q. Did he have diabetes?

A. No, sir.

Q. Did you make any tests for cancer?

A. Yes, sir.

Q. Did he have cancer?

A. No, sir.

Q. Did you make any tests for Buerger's Disease at that time?

A. Yes, the test we use for Buerger's Disease. He had no interference with his vascular system. He did not have Buerger's Disease.

Q. Did you make any test for systemic disease of any kind?

A. Yes, sir.

Q. What did your test reveal?

A. As far as any systemic infection, he did not have any systemic disease.

Q. Doctor, did you make any tests for blood disease such as syphilis?

A. Yes, sir.

Q. What did that show?

A. He did not have syphilis.

Q. By the way, what is ulcerative or ulcer colitis, or have I expressed the term properly?

A. Ulcerative colitis.

[fol. 286] Q. What is ulcerative colitis, Doctor?

A. Ulcerative colitis is where an individual has an ulceration of the lining of the large bowel.

Q. Did you make any tests to determine whether he had ulcerative colitis?

A. Yes, sir.

Q. What did those tests reveal, Doctor?

A. He did not have ulcerative colitis.

Q. Now, then, what did you do for him after you made your various tests?

A. Well, after—after usually trying to clean up this ulcer, we try to clean it, using continuous hot compresses, hot towels, and also put him on antibiotic drugs.

Then the first thing that we did, in any ulceration or any lesion, we took him to surgery and did a biopsy.

By biopsy we mean taking a piece of whatever you are going to examine, and send it to the laboratory to be absolutely—to try and find out exactly what you are dealing with.

Q. What did the biopsy disclose, Doctor?

A. Can I look at my record?

Q. Yes, you can. You can look at them anytime you want to.

Mr. Leasure: Doctor, do you mind giving us the dates of these things as you go along?

A. Yes, sir, perfectly all right.

[fol. 287] Mr. Leasure: It will save a lot of questions on my part if you will.

A. 9-22-54 we took a biopsy of the skin behind the left knee, and the pathological report came back "Abscess of skin."

Q. Now, following that did you do any surgery?

A. Yes, after that—that was on the 22nd. Then—

The Court: What month, Doctor?

A. September of 1954. Then on the 28th of September, the same year, we did a debridement of the ulcer of the left popliteal region in order to attempt to get this area ready for a skin graft, because it was a large lesion.

Q. What is a debridement, Doctor?

A. A debridement is that you remove all abnormal skin, even though into normal skin, to try and clear up any infection you may have, because to attempt to do a skin graft on an area that is infected or inflamed is a hopeless case.

Q. Is that an operation you perform under a general anesthetic?

A. Yes, sir.

Q. And how long did that take?

A. I would have to look at those records on the anesthetic.

Q. Well, forget that for a moment.

A. I would say offhand about an hour. I don't quite remember.

[fol. 288] Q. Following that debridement what did you do for him, Doctor?

A. Well, following the debridement, what we tried to do after that is still to use antibiotic drugs and hot compresses, to attempt to keep that area as clean as you possibly can in order to get it ready for skin grafting.

Q. And after a while did you perform a skin graft, Doctor?

A. Yes, sir.

Q. And did you do it?

A. Yes, sir.

Q. Will you tell us how you did this skin graft and what you did in that surgery?

A. Now, the debridement was done on September 28, 1954, and that area was not ready until October 12, 1954.

As I mentioned a few minutes ago, we put him on antibiotics and hot compresses, and so forth, in order to attempt to sterilize the operative field.

Q. Doctor, during that period between the debridement and the second operation, what was the progress of this ulcer?

A. Well, it was just about the same, and that is one reason we went ahead and grafted it on the 12th of October, 1954.

Q. On the 12th of October, 1954, you did a skin graft?

A. Yes, sir.

Q. Tell us what you did and how you did it?

[fol. 289] A. Well, do you want me to read my whole operative notes?

Q. Yes.

A. Well, I put down here clinical findings, which we write before we give the actual dictation of what we did.

The patient is a 53-year old white male who entered this hospital on the 18th of September, complaining of a large progressively increasing ulcer of the posterior aspect of the lower left thigh, immediately above the popliteal fossa.

That is this area here.

The patient allegedly had been bitten by an insect, and an erythematous papillar lesion arisen.

Q. Can you break those down into little words?

A. What we mean by erythematous, erythematous means red. Papillar means raised. Lesion is a sore, if you want to call it that.

Q. Proceed, Doctor.

A. This is a carbon copy, it is so hard to read.

This broke down forming a small necrotic abscess which gradually increased in size until the time of admission, at which time it measured approximately 5 by 7 centimeters in diameter, and was approximately 1 centimeter deep, and covered with a thick fibropurulent exudate.

That means necrotic and infected, call it pus, it was covered with it.

[fol. 290] Smears and cultures were taken, revealing them to be contaminated escherichia intermedium, and pseudomonas pyocyaneas.

Q. You will have to break that down, Doctor.

A. Just a different type of organisms that ulcers will contain.

The ulcer is biopsied—talking about the first operation and a pathological report was abscess of the skin.

The base of the ulcer was cleaned with repeated applications of varidase, and that is a solution and an ointment that helps healing. After surgery that is what we use.

A debridement was done at the time of the biopsy, and on the 11th of October the patient was brought to surgery for skin graft.

Now, operative notes, technique: Using a Paget dermatome; that is a large knife that we use in order to take off the skin, the skin was taken from the opposite leg which would be the right leg for skin grafting to the left leg.

Q. From what area of that right leg did you take the skin?

A. The thigh.

Q. How much of an area did you cover, can you tell us, Doctor?

A. Well, I can measure—the area?

[fol. 291] Q. Approximately.

A. About that big (indicating).

Q. Thank you. Proceed.

A. A split thickness graft was taken from the contralateral thigh, which means the opposite thigh, which would be the right.

Because of technical difficulties it was not possible to take a graft the size of the ulcer. Hence, three separate grafts were taken, three separate pieces of skin.

Q. All taken from the same right leg, then, were they not?

A. The right leg. Thes grafts were sutured together and sutured to the edges of the wound with small interrupted sutures of black silk.

Both the graft and the donor sites were covered with xeroform gauze dressing, and the patient left the operating room in good condition.

Q. Doctor, you say you sewed them with some—what do you call that?

A. Black silk.

Q. Approximately how many shall we say stitches did you make in that graft?

A. I don't have my notes. But an area of about that big (indicating). I would say at least a hundred all told, because you put them fairly close together.

Q. And was that done under a general anesthetic?

[fol. 292] A. Yes, sir.

Q. Approximately how long was he in surgery?

A. Well, the anesthetic notes, I have it there, but I would say at least an hour.

Q. Following that he went back to his recovery room I presume?

A. He goes back to recovery room.

Q. And following that?

A. He goes back to his room.

Q. Now, that was on October 12, was it not?

A. Yes, sir.

Q. And did you continue to see him then until his discharge on December 8th?

A. Yes, sir.

Q. Tell this Court and jury what progress his condition made, was it the same, getting better, or getting worse?

A. He made absolutely no progress. As a matter of fact, he became progressively worse.

Now, this skin graft that we thought was going to heal, that broke down just like you would take butter and heat it, just melted right away.

And of course then we were confronted with our ulcer again.

Q. Was it larger this time, after the breaking down?

A. Not at the time the skin graft did not heal. But en-

[fol. 293] suing days this ulcer of course became larger. And once again it became infected and once again became more necrotic.

Q. Doctor, when this skin graft broke down what was the appearance of that ulcer after the breaking down of the skin graft?

A. The appearance was practically the same as it was before we even attempted to do a skin graft.

Q. Doctor, have you an opinion whether this condition was painful?

A. It is excruciatingly painful at all times. This man was kept under sedation, demerol, which is a narcotic equivalent to morphine.

We don't use morphine as much as we used to. We use demerol, we use codeine, at all times.

Q. Doctor, at that time did it give off an odor?

A. Not a distinct odor, although it had an odor that it was infected, yes. But no specific odor, I mean, some infections you can smell them and right away you know what type of an infection it is. This had—

Q. What happened in, say, November, what was his condition in November of that year while he was in the hospital?

A. Would that be the 10th month?

Q. Yes.

The Court: The 11th month.

Q. November would be the 11th month.

[fol. 294] A. Well, before that, if you don't mind—

Q. No, proceed, please.

A. On October 27, 1954, we took him back to surgery, and because he developed another mass, a swelling on the left side of his neck—

Q. What area, Doctor?

A. The left side of his neck.

Q. What was the appearance of that mass and swelling?

A. This was a hard, very tender, reddened area of his neck.

Q. And how did this thing progress?

A. Well, we took this patient to surgery, and if I may read the operative notes—

Q. Yes, you may, Doctor.

A. This patient has a rather firm mass on the left side of the neck, smaller than a small almond.

This lesion in the neck was completely removed by excising it, going well beyond the margins of the tumor mass, to attempt to get away from any closeness to this tumor mass, with the idea that maybe we could clear this up.

The tumor mass was found to involve the subcutaneous tissue, that is the fat tissue that we have, of the neck, down to the muscle.

It even involved the fascia, because underneath the fat tissue you have fascia, what we call fascia, and underneath that you have the muscle.

[fol. 295] So this involved not only the skin but the fat tissue and [illegible] fascia down to the muscle.

So it was a fairly deep tumor mass.

Q. Were there any other lesions that appeared besides the two you have already talked about, Doctor?

A. Yes, sir.

Q. Will you tell us what they were and describe them, please?

A. This patient was then brought back to surgery on November 23, 1954. May I read all of it?

Q. Yes.

A. The patient is a 53 year old white male who has had a lengthy hospitalization here as a result of multiple ulcerations of the skin due to pyoderma-gangrenosa, specific etiology unknown.

These lesions have been indolent and have been progressive and have refused to respond to any form of medical therapy.

Because excision previously, the last operation, of an early lesion for purpose of biopsy resulted in primary healing, that is, of the neck, it was felt that some hope might be offered by complete excision of these indolent ulcers, and also in the hope that primary healing might occur in these locations as well.

Q. Now, Doctor, did you take a biopsy of the area around [fol. 296] the neck?

A. Well, he had these other areas over the rest of the body, that is what is in the rest of it, if I may read this.

Q. Did you take biopsies of all of them?

A. Yes, we took biopsies and tried to completely remove them with the hope that they would heal, but—

Q. Did any of them prove to be cancer?

A. No, sir.

Q. Doctor, what was the next surgery, if any, your performed on this man?

A. That is the last surgery that we performed in this hospital stay.

Q. On the first admission, I believe you are talking about?

A. Yes.

Q. Doctor, he was discharged on December 8, 1954. In what condition was he discharged?

A. Well, because of his tremendous lengthy hospital stay and because we thought that possibly if this man went home that at least he can try at home what we were attempting to do in the hospital, and send him home, but we had to readmit him very shortly after his first discharge.

Q. Doctor, at the time of his discharge in December of 1954, can you tell us whether or not Jim Gallick was suffering pain?

A. Yes, sir, all the time.

Q. He came back to the hospital in approximately three [fol. 297] weeks, did he not?

A. May I look at these, please?

Q. Yes.

A. He came back January 4, 1955.

Q. That is December 8th to January 4th, a little less than a month?

A. Yes, sir.

Q. Was he your patient again?

A. Yes, sir.

Q. Will you tell us his appearance on January 4, 1955, with relation or as compared to his appearance when he left the hospital in December of '54?

A. Well, even in the short time his condition became progressively worse, I mean, he had these ulcers and he had a number of ulcers, but particularly this large one he had behind his left leg, and he was beginning to get what we call contractures, because the ulcers were starting to erode down deep into the muscles and down into the tendons, and what we mean by tendons is these things that

control our fingers, that sort of thing, of the back part of his leg. And he was keeping his leg in that position.

Q. What did that cause to happen to that leg, Doctor?

A. Well, there is no doubt that when you have that sort of thing you get what we call an atrophy of muscles, I mean, these muscles start to get smaller and smaller and smaller. [fol. 298] His infection started to erode or eat away his tendons which we have to have in order to move our leg.

Q. Were you able to see that visibly in looking at that ulcer?

A. Yes, sir, no question about it.

Q. Describe what you saw, Doctor?

A. Well, he had this large ulcer of his leg, which you could see down to muscle and also see his tendons, as I explained these things here, you could see those, and some of them were even eaten away. You see the ends of them, shreds.

Q. Doctor, before that, you mentioned the term pyodermagangrenosa.

A. Yes, sir.

Q. Will you tell us what that is, Doctor?

A. Pyoderma means pus. Gangrenosa means gangrene of tissues, infected dying tissues.

Q. And was that the diagnosis made at the time, during the time of first hospitalization?

A. Yes, sir.

Q. What if anything did you do for him by way of treatment after he came back, Doctor?

A. We tried to do everything that we possibly could for this man. I don't think there is anything that we did not try.

[fol. 299] We took numerous cultures of this ulcer. We gave him supportive treatment, as far as transfusions and fluids in his veins.

We tried all of the antibiotics that at least at the time that we knew about.

Q. Tell us about these transfusions, Doctor, did he have many transfusions?

A. I don't remember offhand, but he had a number of them, yes.

Q. What is a transfusion?

Just an injection of blood plasma?

A. It is an injection of whole blood. We take it from another person of the same type that he has, and inject it into a vein, yes, sir.

Q. You say he had many of those?

A. Yes, sir.

Q. Did you have consultation with other doctors?

A. Yes, sir. I had Dr. Kozikowski who is a dermatologist who confirmed what we were doing was right, or if he had any other ideas of something possibly that we were not doing that he could help out.

Q. And at your request did Dr. Kozikowski see him with you on many occasions?

A. Yes, sir, he was my patient at all times, and I ran the show, I mean, he was my patient and these other doc-
[fol. 300] tors were in for—

Q. Did he agree with you in your treatment and the type of treatment that you performed?

Mr. Leasure: I think I will object, your Honor.

A. Yes, sir.

The Court: Just a moment. The objection will be sustained and the jury will disregard the last answer.

Mr. Dudnik: Thank you, Judge.

Q. Did Dr. Kozikowski do anything different for him than you did during the time that he saw him?

A. Not actually do anything different. We tried all these different drugs, and he presented Mr. Gallick to a dermatological society meeting in which the well-known dermatologist—

Mr. Leasure: I will object.

Mr. Dudnik: Just a moment, there is an objection, Doctor.

The Court: The objection is sustained.

Mr. Dudnik: And the Judge is sustaining it which means you can't tell it.

Q. Doctor, he was in the hospital the second time about 14 or 15 months, is that about right?

A. Yes, sir, about that.

[fol. 301] Q. And was he your patient during that entire period?

A. Except for the times I went on short vacations, when I was with the Cleveland Browns out of town and I left other doctors.

Q. Other than that was he your patient?

A. He was my patient.

Q. Until the time he was discharged the second time?

A. Until the day he was discharged, yes, sir.

Q. Now, can you summarize or tell the jury the progress, what you did for him during that 14 or 15 months by way of treating, did you do any more skin grafts?

A. Yes. His second admission, further biopsies were taken. As a matter of fact, because I was out of town or I was going out of town, which I planned my vacation a long time before, Dr. Kozikowski wanted to do some more biopsies, and I told him to go ahead and do it, which he took him to surgery and took many skin biopsies. But the results were always the same as the first hospital admission.

Q. Now, Doctor, was there any further skin grafting done by you?

A. No, sir.

Q. Doctor, as time progressed in the hospital did Jim Gallick get better, stay the same, or get worse?

A. Mr. Gallick got progressively worse, except for maybe a few days at a time where in our own mind we thought [fol. 302] maybe he was getting a little better.

But his progress was downhill from the first day, the first admission that he came in the hospital.

Q. Was his pain more severe as time went on?

A. His pain was always severe. As a matter of fact, it was more severe on the second hospital admission than towards the end, because he got more ulcerative lesions on the other parts of the body.

So he had quite a portion of his body to contend with as far as open lesions, open sores of the skin.

Q. What about the odor of those lesions as time went on?

A. Well, as I said before, they had no distinct odor. They had an odor to them, but no distinct odor of any one type, like some cases there is one odor and you can always remember it. This was a little bit different.

Q. Doctor, did you at the request of did you send any reports or progress reports of his condition to the B & O Railroad?

A. Yes, sir.

Q. And at whose request did you do that?

A. At their request. They asked me about them.

Q. Who asked you about them?

A. Can I look?

Q. Yes.

A. One was D. A. Wyner, M.D., medical examiner. He [fol. 303] asked me for reports on Mr. Gallick's condition.

Q. Anyone else, Doctor?

A. Yes, sir. Mr. A. L. Williams, and I am sure he was the District Claim Agent, Room 513, Metropolitan Building, Akron 8, Ohio.

Q. Did he ask you?

A. Yes, and I wrote him a report.

Q. How many reports altogether did you send to the Baltimore and Ohio Railroad?

A. Three.

Q. Now, Doctor, Jim Gallick was discharged from Marymount Hospital the second time some 14 or 15 months after his second admission; can you give us the date of the discharge?

A. He was discharged March 8, 1956.

Q. What was his condition on the day of his discharge?

A. His condition was poor.

Q. Did you see him after that professionally?

A. No, sir.

Q. Did you learn where he went after that?

A. Yes, sir.

Q. Where, Doctor?

A. Cleveland Clinic, and eventually Highland View Hospital.

Q. Doctor, did you at my request examine his right arm today?

A. Yes, sir.

[fol. 304] Q. And will you describe to the jury what you saw?

A: I examined Mr. Gallick's arm at lunchtime at the request of Mr. Dudnik, and his right upper arm was wrapped with a sort of muslin dressing, and underneath that his upper arm showed he had a lot of scar tissue, and he also had an ulcerative area on the outside of the arm, outer portion.

Q. How did that compare with the first ulcer that you saw on the back of his left leg, Doctor?

A. Of course, it wasn't the size. It didn't have the depth of the ulcer when I first saw him. But it looks like some of the ulcers in which he had on other parts of the body that started the same way.

Q. Doctor, after seeing his arm today, can you give us a prognosis as to what is the future of that arm? You can answer that yes or no, whether you can give us a prognosis?

A. Yes, I think I can.

Q. What is your prognosis?

A. My prognosis is based on knowing what Mr. Gallick originally started with in 1954, and seeing what happened to those two legs, and seeing an ulcer on his arm now, I don't see why I should think that the future holds anything but an amputation for him.

Q. Of the arm?

A. Of the arm.

Q. Doctor, the condition that you saw him in today, is he [fol. 305] a patient requiring hospital care and hospitalization?

A. Absolutely.

* * * * * * *

[fol. 343] The Court: First, may I ask, are the hospital records offered in evidence?

OFFERS IN EVIDENCE

Mr. Dudnik: Your Honor, I am going to do that at this time.

At this time I offer in evidence Plaintiff's Exhibits 13 and 14, which are the Mary Mount Hospital records, in full,

and Plaintiff's Exhibit No. 15, 16, and 17, which are the Cleveland Clinic records in full.

Mr. Leasure: No objection, your Honor.

(Plaintiff's Exhibits 13, 14, 15, 16 and 17 were marked for identification by the reporter.)

The Court: Without objection they will be received. Plaintiff's Exhibit 13 and 14 are the Marymount Hospital [fol. 344] records?

Mr. Dudnik: That's right, your Honor.

The Court: And Plaintiff's Exhibits 15, 16 and 17?

Mr. Dudnik: Yes, your Honor.

The Court: Those are the Cleveland Clinic records?

Mr. Dudnik: Yes, sir.

The Court: Ladies and gentlemen of the jury, you will remember at the close of our session yesterday a hypothetical question was put to the witness, Dr. Ippolito, to which an objection was raised.

I want to say that the hypothetical question and the objection raised by counsel for the defendant have been considered by the Court, and a new hypothetical question will now be posed by counsel for plaintiff.

Thereupon Dr. Victor Ippolito resumed the witness stand and was further examined and testified as follows:

Direct examination of Dr. Victor Ippolito, resumed.

By Mr. Dudnik:

[fol. 345] Q. Dr. Ippolito, I want you to assume that James Gallick, a man who in August of 1954 was 53 years of age, and had no prior diseases with the exception of chicken pox; that the only other mishaps that he had were three or four minor accidents before August of 1954.

That he never had skin diseases, skin eruptions, allergies, or any other illness of any kind.

That prior to 1954 while eating during an argument he swallowed something which caused him pain in his chest

and he called on a doctor who saw him I think once and perhaps twice, from which he recovered.

Doctor, assume further that this man went to work for the B & O Railroad in 1944 as a brakeman and switchman, that all his life he had done hard manual work. The longest job before that having been with the Hunkin-Conkey Construction Company in construction work.

That from 1950 to 1954 he worked very steadily on one job for the B & O Railroad, known as the Downtown Number 2 job, which consisted of switching cars in the flats of Cleveland; that in that area there was a bridge known as the Columbus Road bridge, which extended in an easterly and westerly direction; under which ran a single track or two rails which extended in a northerly and southerly direction.

That for many years prior to August 10, 1954, there existed underneath the bridge a swamp or ditch area which [fol. 346] constantly contained water, in which there were lying rats, dead rats, and dead pigeons, sometimes or most of the time between twenty and thirty, in this stagnant water.

That in and around these dead rats and dead pigeons there crawled and flew bugs and insects of many kinds and description.

Assume further, Doctor, that farther down that river track, or to the south, there were areas where other dead rats and pigeons were laying around, as well as farther up the bridge toward the north.

Assume further that the greatest concentration of dead rats and dead pigeons was in that water, in the ditch, which ran alongside one of the rails, and was directly underneath the bridge, the Columbus Road bridge.

Assume further, Doctor, that this was called to the attention of employees of the company on occasions.

Assume further, Doctor, that on occasions the road men or track men had attempted to clean that area out, but without success.

That on approximately August the 10th of 1954, the exact date being unknown, Jim Gallick had occasion to walk underneath the Columbus Avenue bridge from a

southerly to a northerly direction, that he walked on the left side or westerly side, or opposite from where the ditch was which contained these vermin which I have spoken about; that between him and this ditch were these two [fol. 347] rails of the single track.

That he stopped underneath the bridge for the purpose of determining where his engine was, and therefore in doing that instead of heading north as he was in walking, was then headed south.

And that as he was standing there for about 30 to 45 seconds he saw his engine, decided to continue to proceed underneath the bridge, had started to turn north again, made one or two steps in a northerly direction, when he felt a sting or bite behind his left thigh about four inches above the knee.

That he touched, grabbed it with his hand, an object with his hand, that he squeezed it, that he heard it and felt it pop, that he did not see it, but it was about the length of three of his fingers, and as big around as his little finger.

That after he squeezed it and it popped, he felt it roll down the back of his pant leg.

Assume further, Doctor, that that sting or bite he continued to feel it, he was conscious of a pain there at all times until 7:00 that evening, this having occurred approximately 3:30 in the afternoon, about one-half hour after he started his daily tour of duty.

That about 7:00, or four hours later, when he had his dinner, either shortly after or before, he lowered his pants [fol. 348] in a dressing room of some kind, could not see this area where he felt the pain and where he was bitten, took some soap and water and washed it, continued however on his tour of duty until 11:00 that night.

Doctor, assume further that at 11:00 or 11:30 when he came home he lowered his trousers and showed his wife the area where he felt this bite, which continued shall we say to bother him, or pain him, but not too great.

That she described it to him as a raised area, red in appearance, and I think a pink center or white center; that it was small, that it gave neither him nor her any concern.

or no concern, that he washed it that day, that night, continued to work the following day.

The next morning she saw it again and it appeared slightly larger. It gave him nor her any concern, and he continued to work for some four or five or six or seven days, washing it and treating it himself.

That about six or seven days later, the area then appeared the size of a half a dollar, was raised and pink, with a head on it, and while he was taking a bath this area with the head on it broke open, and that then he went to see a doctor.

Assume further that the doctor saw this area, does not recall or has no record of whether he took a history of how it happened or not, gave Mr. Gallick an injection of penicillin [fol. 349] with some ointment dressing, and told him to come back in a couple of days.

That he did come back in a couple of days, Doctor, when the body was again injected with penicillin, further dressing of some kind, and told to come back, which he did.

That he came back on some four or five occasions, the last occasion being I think September 7th of 1954—I don't have it at the moment—that at that time the doctor examined and decided it was resisting treatment; that rather than improving it was getting worse, and recommended that he be hospitalized for further studies.

Assume further, Dr. Ippolito, that following that recommendation Mr. Gallick did not go back to the doctor, but then came to see you.

Assume further that you saw him on the date that you said you saw him the first time, where he gave you the history of an insect bite, and that you put him in the hospital, performed the work that you told us about, performed the operations, that he wasn't getting better, that he was in the hospital some three months the first time, that he was gone home for about three weeks, came back and stayed some 14 or 15 months, during which time you treated him as you described, and that many other lesions occurred on the body.

Assume further, Doctor, that his condition was getting progressively worse; that the lesions in his leg were so

[fol. 350] deep that you could see the tendons and muscles, some of which were torn, that he had atrophy, and that you sought consultation, and that all the medication and treatment that you had given him did not improve his condition.

Assume further, Doctor, that shortly after his discharge from the hospital the second time when he was no longer your patient, he entered the Cleveland Clinic as a patient of the Cleveland Clinic.

That there many operations were performed, that he was there for some two years, the exact date which is not known to me at the moment, or not readily in my mind at the moment;

Assume further, Doctor, that after these many operations, in May of 1957 one leg was amputated with a short stump below the hip, and approximately a year later—I having told you yesterday a month later—that approximately a year later the other leg was amputated.

Assume further that in July of 1958 he went directly from the Cleveland Clinic to Highland View Hospital, where he has been a patient ever since.

Assume further, Doctor, that you examined him today, and that you found an area on this right arm which was necrotic, which was as you described, and which looked like some of the areas of infection that he had while he was your patient.

Assume further, Doctor, that he is a hospital patient [fol. 351] now, and will be one, and that he is in a condition where he requires hospitalization.

Assume further, Doctor, that it is your professional opinion that the right arm will have to be amputated.

Now, Doctor, taking everything that I have given you in this hypothetical question to be a fact, based on that, based on your treatment and observation of this man, do you have an opinion based on reasonable medical certainty as to whether or not there is a direct or proximate causal relationship between the ditch containing the water, stagnant water, the dead rats, the dead pigeons, the insects flying around it, the bite or sting which he sustained on that day, and his present condition as you have seen him

today; and I will ask you to answer that question yes or no, whether you do or do not have an opinion.

A. Yes, I do.

Q. Doctor, what is your opinion?

A. I think—

Mr. Leasure: Just a moment, just a moment. Now at this time I am entering an objection, both generally and for the specific reasons stated yesterday.

The Court: Objection overruled.

Q. You may answer.

A. My professional opinion is that there is a direct cause [fol. 352] between the filthy, infected swamp, or area of stagnant water, which Mr. Gallick was working nearby, and the insect bite to his left leg, and the conditions that followed thereafter, and by that I mean the amputations of both of his legs, and in my opinion, professional opinion, in the future his right arm will have to be removed.

Mr. Dudnik: You may cross-examine.

Cross examination of Dr. Victor Ippolito.

By Mr. Leasure:

Q. Dr. Ippolito, if you can't hear me, I know you have noise behind you there, just let me know.

A. That is all right.

Q. Now, you have been asked a hypothetical question which covers some nine pages, and you have been asked to assume numerous facts?

A. Yes, sir.

Q. I want to ask you this one question about that. Are all of the facts that you were asked to assume necessary for you to reach the opinion that you have just expressed?

A. Well, Mr. Leasure, you know as well as I do, it is a very long question, and I didn't bother to listen to every word whether this man was standing going north or going south; or where he was going. I picked up what in my professional opinion were the pertinent facts, where the man [fol. 353] was working, the conditions in the area where he

was working, the condition of the water as Mr. Dudnik told me, and I assume he knows the facts and I remember them, yes.

Q. So I take it then you are telling us that not all the facts stated in the question were necessary for your opinion?

A. The question of going east or going west, whether he was standing there—

Q. Will you just answer my question yes or no?

Mr. Dudnik: Your Honor, I think he has answered the question.

Mr. Leasure: We have already had an explanation. I would like to have a direct answer now if I may.

The Court: He may answer if he can.

A. Yes or no?

The Court: If you can answer yes or no.

A. Will you restate your question, please?

Q. The question is: I take it then that all the facts assumed were not necessary for you to reach your opinion?

Mr. Dudnik: The Court says you can answer that yes or no, if you can. And if you can't, answer it your own way.

A. May I answer it in my own way? I can't say yes or [fol. 354] no, because some of them were pertinent facts that I assumed, and others that—

Q. That were not pertinent?

A. That were not pertinent, as what direction was he walking.

Q. That answers it. Doctor, did you ever discuss Mr. Gallick's case with Dr. Heller?

A. No, sir.

Q. You understood, did you, that Dr. Heller had treated him before he came to you?

A. I only knew that he had seen another doctor before I saw him, but—as a matter of fact, I don't even know who Dr. Heller is.

Q. Did you ask Mr. Gallick who the other doctor had been?

A. No, sir.

Q. Weren't you interested in that?

A. I would say that 99 out of a hundred patients who come to my office that have been to other doctors, I never ask them if they were to other doctors.

Q. Were you interested in determining whether any other doctor had medical information which might be relevant to this particular case?

A. At the time that I saw Mr. Gallick, I was not interested. I was only interested in the history that he gave me and what I found.

[fol. 355] Q. So you proceeded then entirely upon the history that Mr. Gallick gave you?

A. Yes, sir.

Q. And you did not check with Dr. Heller?

A. No, sir.

Q. Now, Doctor, I am not sure I am clear, as I understand it, the field of medicine has different specialties, is that correct?

A. Yes.

Q. Quite a few, as a matter of fact, in this day and age?

A. Too many.

Q. Are you a specialist in a particular field of medicine?

A. General surgery.

Q. General surgery?

A. Yes, sir.

Q. That does not include the field of dermatology?

A. No, sir.

Q. That is a separate specialty, is that correct?

A. Yes, sir, yes, sir.

Q. And how about the field of internal medicine?

A. No, sir, I am not a specialist in that.

Q. That is a separate field, also?

A. Yes, but any good surgeon, good surgeon, should have the knowledge of internal medicine, and also some knowledge of skin diseases that pertain to his field.

[fol. 356] Q. You have a general medical knowledge of the entire field of medicine, do you not, as a doctor?

A. Yes, sir.

Q. But what is the specialty of internal medicine, as such, as a specialty?

A. Of internal medicine?

Q. Yes. Is it diagnostic of systemic diseases?

A. It is not only diagnostic, but the treatment of systemic diseases.

Q. Now, on the subject of insects, do you hold yourself out as a specialist in that field?

A. No, sir.

Q. I take it you do not have any specialized knowledge as to the particular kinds of insects or their nature, their habits, and so forth?

A. No, sir, I do not.

Q. Do you know of any insect in this area of the country that measures about one-half inch by two inches, that is known to attack human beings?

A. As I mentioned before, I am not a specialist in insects. Therefore, I can't answer that.

Q. Now, I notice you were referring to certain records yesterday, Doctor, as you testified?

A. Yes.

Q. Were those your office records?

[fol. 357] A. Just these here.

Q. May I look and see just what it was?

A. Yes.

Q. Are these your office records?

A. Yes, sir.

Q. Fine. May I just glance over them a minute?

Doctor, do you have an entry in here someplace that you put down when Mr. Gallick first came to see you?

A. Yes. It is on the top of that first page on the right-hand corner.

Q. I see you put down a history here, Doctor. But did you put down any entries as to what you found concerning his condition? I see you have this entry, "Man has very large ulcer," and something about admission to Marymount.

Is that the extent of the entry you made at that time?

A. Yes, sir. When there is an acute lesion, I just put down the facts as I see them and admit him to the hospital.

Q. Did you make any smear or culture before you put him into the hospital?

A. No, sir. I knew he was going immediately into the

hospital as an emergency case, and those smears and cultures were all taken at the hospital.

Q. Were you able to tell—now this is before you got him into the hospital—were you able to reach any medical conclusion as to the type of infection that he had there in his [fol. 358] leg when you first saw him?

A. All diagnoses are made by the history a patient gives you and also what you find on physical findings.

Q. I am asking you about what you found on physical findings.

A. I found, the history of course, the diagnosis is always made by history plus physical findings.

Q. Doctor, will you just answer my question. I am asking you whether you could tell by looking at it, whether you reached any conclusion from looking at it and examining it, as to what infection was there?

A. I had an impression, I had an impression at that time of a large ulcerated lesion behind the leg.

Q. Doctor, we will make faster progress if you will just answer my question.

Mr. Dudnik: I submit, your Honor—

Q. Because there are many things I will come to that will cover perhaps what you have in mind.

Mr. Dudnik: I submit, your Honor, that the question has been answered.

Q. I am asking you about the type of infection. Did you reach any medical conclusion based upon your observation and examination without reference to history now, as to what if any kind of infection he had at the time he first saw you?

[fol. 359] A. That would be impossible to do at that time, because I had no cultures or anything else. I made a diagnosis of an ulcer of the leg.

Q. All right. At that time do I take it, then, that you did not reach any conclusion as to whether that ulcer was—well, strike that, we will come to that later.

This question, however, Doctor: At that time did you find in Mr. Gallick from your observation of his condition

any sign or symptom indicating any toxin or poison from any insect or any animal of any kind?

A. The patient probably was in my office only a matter of twenty minutes, or half an hour. I saw the ulcer, and to attempt for me to tell you that I excluded all possibilities of toxins and syphilis and diabetes and everything else in my office, no. That is one reason why I admitted this man to the hospital the same day.

Q. Now, the question is, Doctor, at the time he was in your office, did you see any sign or symptom in him which indicated to you the presence of any toxin or poison in his system?

A. Not that I could determine from appearance.

Q. Now, after he got into the hospital, just to round out that question, after he was in the hospital did you see any sign or symptom in Mr. Gallick which would indicate the presence in his system of any toxin or poison?

[fol. 360] A. What do you mean by that question?

Q. Well, let's approach it in this way: Does a mosquito inject something into the body which causes swelling?

A. Yes.

Q. Does a honey-bee, for example, inject something into the skin which causes swelling?

A. Yes, sir.

Q. Is that in the nature of a toxin or poison from the insect?

A. You could call it that, an allergic reaction at that time.

Q. Well, it is a type of venom, isn't it, injected from the animal itself?

A. A type of it, yes, sir.

Q. That is what I am referring to. Perhaps I should say venom.

A. No, the reason—the reason I couldn't answer that yes or no is for the simple reason I saw this man approximately one month from the time that he was bitten, and I saw him with a large ulcer.

Q. You made no attempt to check with Dr. Heller to find out what he had observed?

A. No, sir.

Q. Now, we have in evidence here, Doctor, the Marymount Hospital records, and as I understand it, those records [fol. 361] start about two days after you first saw this man. Is that correct?. You saw him on September 16th, according to your office record here. You might want to look at them.

A. September 18. 1:30 p.m.

Q. So he was admitted two days after you first saw him?

A. Yes.

Q. Now, I want to get this matter established, Doctor. From my observation of those hospital records, they are rather voluminous. Now, can we agree that those Marymount Hospital records contain entries of all medical facts and findings which are considered relevant and of importance to Mr. Gallick's case?

A. I would think so, without reading it all.

Q. During the time that he was in the hospital?

A. I would believe so.

Q. That is one of the purposes—

A. To the best of my knowledge.

Q. Doctor, you are familiar, or you were familiar with those records; as a matter of fact, many of the entries are in your own handwriting, aren't they?

A. Yes, sir.

Q. And you were in charge of the case during the time he was at Marymount?

A. Yes, sir.

Q. That is one of the purposes of hospital records, is it [fol. 362] not, to contain all relevant and important findings, and entries by the doctors and other people connected with the case?

A. They should be in the records.

Q. All right. As far as you know, all such facts were included in those records, is that correct?

A. Yes, sir.

Q. Now, a couple of things, Doctor—getting away from the hospital record for the moment—can we agree that the field of medicine is an in-exact science, as distinguished from mathematics?

A. No, I won't agree to that.

Q. All right, let me ask you this, then: Are there many

questions and problems having to do with the human body, the answers to which are still unknown to medical science?

A. Yes, that I will agree to.

Q. There are many of them, aren't there?

A. A number of them. I won't say many.

Q. What is the situation, Doctor, as to the human body when we are children up to a certain age, does the human body grow and develop to a point, and then stop?

A. Yes.

Q. At about what age is that?

A. It depends on individuals. Around 16, 17. It varies with certain individuals. Some 18.

[fol. 363] Q. When that process stops, what starts to happen, an aging process?

A. Well, yes, we all get a little bit older, if you mean it that way.

Q. Well, I am just trying to find out if there really are two areas of human life, one where you grow and develop and reach a stopping point, and then—

A. You start to deteriorate?

Q. Then you start to deteriorate. Do you agree with that?

A. Well, I would have to agree with that, with certain reservations, I guess.

Q. I am speaking generally now, so we can get the overall picture?

A. Yes, all right.

Q. Now, as we deteriorate from age, in our late teens, or whatever it is, our bodies are constantly changing, are they not, in one way or another?

A. Certain parts of our bodies are changing, yes. Certain parts. Not all.

Q. And certain conditions will develop at certain times during later life for the first time, is that correct?

A. Can you be a little more specific about that?

Q. Well, we just get into problems if I pick out one or two examples. I am trying to cover generally. Well, let's take the subject of cancer. It is not unusual, is it, for people [fol. 364] in later life to suddenly develop a cancer somewhere?

A. Yes, but they can develop them shortly after birth, too.

Q. Oh, it is possible, yes.

A. More likely so as you mention, as we get older, certain types of cancer are a little more common in later life than they are in early life. That's true, yes, sir.

Q. And the body chemistry changes from time to time, doesn't it, what little is known about it?

A. It changes slightly, depending mainly, not when the patient is in good health, as our body chemistry changes to a varying degree. It is only in people who are ill, where your body chemistry changes a great deal.

Even a patient, a good many times, almost at death his body chemistry, as far as we know, chemically speaking, does not have to change.

Q. Of course, it doesn't have to, but oftentimes it does, do you agree?

A. It may, it may.

Q. Not only on the subject of cancer, but many many other conditions and diseases will show up as people progress and get older, forties, fifties, sixties, is that correct? I don't want to burden this point but I do want to establish it.

A. Speaking in generalities, I would rather that you speak on specific things because I could better give you an [fol. 365] answer to that. If you are talking about let's say diabetes that may show up when a man is fifty years old, that is, you pick it up at fifty, but did that man have it when he was twenty, if you did a thorough enough search?

Q. In other words, you think in the case of diabetes, a man may have it and the doctor doesn't find it?

A. And not find it, that is possible, yes.

Q. That same thing generally is true with other conditions, is it not, a person may have it and the doctor just doesn't find it at that time?

A. It depends on how thorough a doctor is.

Q. And how far the condition has progressed?

A. I will agree to that.

Q. Now, I will call upon your testimony of yesterday, according to my notes you said that this man, Mr. Gallick,

was suffering from pyoderma gangrenosa; did I understand you correctly?

A. Yes, sir.

Q. Now, I think it important that we try to find out a little bit more of what that means. Is that term, pyoderma-gangrenosa, a medical term that is recognized by doctors, including dermatologists, as a description of a specific or particular condition?

A. I believe it is, yes, sir.

Q. So when a doctor says pyoderma-gangrenosa, and an- [fol. 366] other doctor wants to find out more about it, he can turn to that heading in certain medical books and see what is said about it there, is that correct?

A. He can, yes, sir.

Q. Now, with that in mind, I want to ask you if you agree with this definition of pyoderma-gangrenosa as contained in a book entitled "Introduction of Dermatology," by Sutton and Sutton, fourth edition: "Pyoderma—"

Mr. Dudnik: Just a moment, there is an objection, your Honor. He hasn't laid the foundation. He hasn't asked whether the Doctor is familiar with the book, and he cannot ask that question unless the Doctor knows the author, has read the book, and either agrees or disagrees with it.

Mr. Leasure: I don't agree with that at all.

Mr. Dudnik: That is the law.

The Court: I think the Doctor testified, he used the term pyoderma-gangrenosa yesterday. I think the foundation was laid to ask the Doctor questions concerning the term.

Mr. Dudnik: Yes, your Honor. However, it is my contention that while he can ask him any questions regarding [fol. 367] his definitions, he cannot ask him whether he agrees with a definition written by another doctor, unless he lays the foundation as to whether he has read that doctor's opinion, and either agrees or disagrees with it.

You cannot cross-examine about a book or regarding the book which the witness has not read and knows nothing about.

He must first ask him if he knows about that book, whatever book he is reading from, and if he doesn't know about it, your Honor, he cannot ask him whether he agrees or disagrees with it.

Mr. Leasure: I don't agree with that at all, your Honor, because he can agree or disagree whether he ever read the book or not.

Mr. Dudnik: I think he has to lay the foundation.

The Court: I will permit counsel to ask the question.

Q. Do you remember the first part of the question now, Doctor?

A. No, sir.

Q. The question is whether you agree with this definition of pyoderma-gangrenosa as contained in the book entitled "Introduction to Dermatology," by Sutton and Sutton, fourth edition: "Pyoderma-gangrenosum, one of several [fol. 368] sloughing ulcers, succeeding upon red nodular lesions in persons with chronic debilitating internal infection. Improvement dependent on internal condition."

Do you agree or disagree with that?

A. I do not agree with that in its entirety, just in debilitated individuals that you can get pyoderma-gangrenosum, no, sir.

Q. Further on in the same work, do you agree with this statement: "Ulceration is co-related with the internal debilitating infection. The mechanism of this is unknown."

Mr. Dudnik: May I make an objection for the record?

The Court: Objection overruled.

Mr. Dudnik: Exception.

Q. Do you agree or disagree with that?

A. I don't agree with that in its entirety.

Mr. Dudnik: May I have the author, sir?

A. Sutton and Sutton.

Mr. Leasure: It was read from Sutton and Sutton.

Q. Well, let's take another one, Doctor, and see whether you agree or disagree here.

The Court: May I see counsel?

* * * * * * *

[fol. 372]

STATEMENT BY THE COURT

The Court: Ladies and gentlemen of the jury, since this Court has permitted Dr. Ippolito, an expert, to state his opinion, there is brought into this case the entire extent of his knowledge of medicine, and thereby his knowledge of the literature on that subject.

[fol. 373] The Court has ruled that it is proper that he be cross-examined as to that knowledge, and therefore is permitting recognized medical books or treatises to be used for the purpose of testing Dr. Ippolito's knowledge, and the accuracy of his opinions, whether he relied on these books directly, indirectly, or not at all.

These medical books and treatises, though recognized as standard authorities on the subject to which they relate, will not be admitted in evidence to prove the truth of the statements contained therein.

Cross examination of Dr. Victor Ippolito, resumed.

By Mr. Leasure:

Q. Doctor, at the close of this morning's session I started to ask you about a book entitled "Diseases of the Skin" by Ormsby and Montgomery. I want to ask you if you agree with this statement contained at Page 403 in that book under the heading Pyoderma-gangrenosum: "Under this title Brunsting, Goeckerman, and O'Leary described early furuncle-like lesions which rapidly broke down and produced ulcers which spread peripherally. There frequently is exacerbation and remission and the condition is almost invariably associated with an ulcerative colitis."

Do you agree or disagree with that statement?

[fol. 374] A. I do not agree with the entire statement. I think there should be some modifications to that statement.

Q. Doctor, I ask you about a book entitled "Dermatology," by Pillsbury, Shelley, and Kligman, and ask you if you agree with this statement, Page 490:

"It is helpful from a didactic standpoint to consider in a group all ulcers, whether primary or secondary in which

bacteria have etiologic significance. In fact, bacteria are the primary etiologic agents of only a few ulcerative conditions. Any ulcer, of course, may become secondarily infected with bacteria, and most of these will be of the non-descript type not requiring any further discussion here."

Do you agree with that?

A. Will you re-read that first sentence, please?

Q. The very first part?

A. Yes, sir.

Q. "It is helpful from a didactic standpoint to consider in a group all ulcers, whether primary or secondary, in which bacteria have etiologic significance."

A. All right.

Q. Do you want the rest of it?

A. Yes, please.

Q. "In fact, bacteria are the primary etiologic agents of only a few ulcerative conditions. Any ulcer, of course, may become secondarily infected with bacteria, and most of these [fol. 375] will be of the non-descript type not requiring any further discussion here."

A. Yes, I will agree with that statement.

Q. And by the phrase "secondarily infected"—well, I will read from the beginning of the sentence: "Any ulcer, of course, may become secondarily infected with bacteria," does that mean, Doctor, that I have an ulcer on the surface of my skin somewhere—and by the way, an ulcer is an open sore, is it not?

A. An open sore, yes.

Q. All right. I have an open sore someplace on the surface of my skin; and by the words "secondarily infected," does that mean that bacteria may get into that open sore after it becomes an open sore?

A. We are assuming that that ulcer was not caused by a bacteria to start out with.

Q. Not at the beginning, that's right.

A. And that the ulcer may become secondarily infected by other organisms?

Q. Yes.

A. Yes, I will agree to that.

Q. So that if I should then come under your care with that

open sore on my skin, some time after it has become an open sore, you make a smear of it and find bacteria in that, those bacteria could have gotten there after the open sore was [fol. 376] already there, is that correct?

Mr. Dudnik: There is an objection to the statement "could." We are dealing with probabilities and not possibilities, your Honor.

Therefore there is an objection to that question.

The Court: Well, this is cross-examination. I am going to permit it.

A. Will you state it over again, please?

Q. All right. I come under your care with an already existing open sore somewhere on my skin; you take a smear from that, make a culture, and find a certain type of bacteria. Is it possible that those bacteria that you find at that time could have come into that open sore after it became an open sore?

Mr. Dudnik: Objection.

The Court: Are you stating a hypothetical question?

Mr. Leasure: I am using this as a purpose of illustration, your Honor, of secondary infection. I am asking in effect whether that is what secondary infection is.

Mr. Dudnik: I object to the word "possible."

Mr. Leasure: It is in the nature of an illustration.

[fol. 377] The Court: He may answer.

A. It is possible, yes.

Q. Going on in this same work here that I just referred to—

Mr. Dudnik: Is that Montgomery?

Mr. Leasure: No. This is still—this is Pillsbury.

Q. Page 493, and I will ask you if you agree with this statement under the heading of Burrowing of Academic Ulcers:

"Dermatologists are familiar with the same disease under the term of Pyoderma-gangrenosum, which has come to be

regarded as a complication peculiar to ulcerative colitis, although other underlying wasting diseases such as empyema may provide the systemic background. In the latter instance, the course of the ulcer tends to fluctuate with the gravity of the primary condition, improvement being noted when the ulcerative colitis, for instance, is in a subsiding stage."

Do you agree with that?

A. I don't agree in its entirety, no, sir.

Q. Then to continue at Page 494 of the some book, do you agree with this statement:

"The treatment of such extensive ulcers requires a vigorous attack on the primary underlying condition. It has been noted repeatedly in the case of ulcerative colitis that healing occurs when the colitis subsides, but recurrence in- [fol. 378] duces relapse of the cutaneous ulcer. The state of the ulcer is a measure of the general health of the patient, providing an index to the degree of resistance. In certain instances there may be a specific biochemical defect that is responsible for the vulnerability of the skin to infection," and then a word as long as my arm, "Hypogammaglobulinemia."

Do you agree with that statement?

A. Mr. Leasure, are you trying to tell me that this case that we have in front of us is a case of ulcerative colitis and that is why this man has a pyoderma-gangrenosa? Just for me to say yes or no on such statements that you are reading?

Q. You have asked me a question.

A. Yes, sir.

Q. I am asking you the question simply of whether or not you agree with the statement contained in the book, the statement that I have just read?

A. Well, I do know that certain cases of ulcerative colitis may get certain skin manifestations, but I still don't agree with the sentences that you have told me one hundred percent.

Q. That's all I want to know.

A. It is hard for me to answer yes or no to certain of these questions. That I absolutely can't do.

Q. I think you have answered the question. You say you [fol. 379] don't agree entirely, all right. By the way, in addition to the words "ulcerative colitis" in the previous quotation, we used the word for another condition known as empyema. Do you recognize that?

A. Empyema?

Q. Yes.

A. Yes, sir.

Q. What is that condition?

A. Empyema usually follows a pneumonia. Years ago before the advent of anti-biotics we used to see a lot of cases of empyema, in which a patient would get pneumonia and would get an infection of his pleura cavity and that would cause an empyema; or you may get an empyema of a gall bladder in which the gall bladder becomes acutely inflammed and has nothing but pus in it. That is an empyema of the gall bladder. It is a local collection of pus.

Q. It is an infection, then, within the chest cage?

A. Chest cage or abdominal cage. Cavities, as I said, empyema of the gall bladder, it depends on what organ you are speaking of.

Q. And then a book entitled "Essentials of Dermatology," by Norman Tobias. Page 146. I want to ask you if you agree with this statement under the heading Pyoderma-gangrenosum:

"The condition often is associated with empyema, dysen- [fol. 380] tery, and chronic ulcerative colitis, some cases of which are caused by a strain of streptococcus. There is evidence available that suggests that the lesions of pyoderma-gangrenosum are embolic or produced by an Arthus Phenomenon. Avitaminosis A is often present as a predisposing factor.

Do you agree with that?

A. I agree with that, yes.

Mr. Dudnik: What book, what page?

Mr. Leasure: The red one here, Page 146.

Mr. Dudnik: Red book, 146.

Q. An avitaminosis is what, Doctor?

A. An avitaminosis is a deficiency of one of the multiple vitamins that are necessary for the human body.

Q. Now, certain X-rays of Mr. Gallick's chest were taken at Marymount Hospital, were they not?

A. During the times he was there, yes, yes.

Q. Can you turn to your hospital notes and give me some information about those? Will you look at the chest X-ray reports taken some time in September of 1954, shortly after his admission?

A. I don't see a chest report on his first admission, although I know they were taken. Oh, wait a minute, I have it.

[fol. 381] Q. All right, fine. Will you tell us what that chest X-ray—first, give us the date of it, if you will, please?

A. 10-22-54.

Q. Well, I have a note of September but perhaps—may I just look at that and see if it is the same one I have in mind? There is one before that.

A. I doubt whether there was one before this. I think it was at the next hospital admission and not the first one.

Q. Well, I don't have time now to look through there.

A. Do you want me to read this?

Q. No, that isn't the one I have in mind.

The Court: Are these records from Marymount now?

A. Yes, sir.

Q. Will you turn to the first X-ray reports you have, and whatever the date of it is—

A. 10-22-54.

Q. Which showed some nodules or growths of some kind?

A. I haven't seen it but I am positive it was the second hospital admission and not the first.

Q. Well, will you find it, whatever it is?

A. There are quite a few here.

Q. Perhaps I can help you out. Do you find one for August 4th of '55?

A. There is one for 7-18-55. That was the second hospital [fol. 382] admission.

Q. May I look at that and see if that is the one I have in mind?

A. I don't see any others for the first hospital admission, except the one that I showed you.

Q. Will you turn to this one for August 3rd, 1955, and tell us what the conclusion was on that X-ray, Doctor, that appears in writing there?

The Court: What is the date of this X-ray?

A. 8-3-55. This is the conclusion: "Cavitating lesion of the peripheral portion of the right lower lobe which probably represents a carcinoma of the peripheral type. Encapsulated abscess shall also be considered in the differential diagnoses."

Q. What is a carcinoma, Doctor?

A. Carcinoma is cancer.

Q. Now, was that X-ray of the lungs of Mr. Gallick?

A. Yes, sir.

Q. Both lungs?

A. Yes, sir.

Q. And the reading relates to the right lung?

A. Yes, sir.

Q. All right. What is encapsulated abscess?

A. Encapsulated abscess means a localized abscess that [fol. 383] has a surrounding around, of the shell type, around it.

Q. An abscess contains what?

A. Pus.

Q. Indicating an infection of some kind there at that location?

A. Yes, sir.

Q. Now, will you turn to the X-ray report for September 29, 1955, and read what the finding was on that?

A. September is the ninth—

Q. September 29 I believe it is.

A. This is September 26th.

Q. Perhaps it is the 26th. Yes, that is the one. Will you read the conclusion on that?

A. Conclusion: "No significant change in the nodule of the right lower lobe since the last examination. Additional solitary well defined nodule in the middle third of the right lung. Possibility of a metastic tumor should be considered along with small focal abscesses."

Q. Doctor, leaving that subject and going to something else now, did I understand your testimony this morning that Mr. Gallick came to you about September 16, 1954, with an open sore on the back of his leg, is that correct?

A. Yes, sir.

Q. That is the only open sore he had on his body at that time, is that correct?

[fol. 384] A. Yes, sir.

Q. —that you found, all right. Now, shortly following that, however, did he develop following his admission to the hospital, I think it was late in September of that year, did he develop a redness and swelling someplace in the area of his left armpit?

A. Neck and chest.

Q. Well, let's take them one at a time.

A. All right.

Q. How about under the left arm?

A. I believe so. I haven't looked up his record completely.

Q. And did you prescribe that heat should be applied to that?

A. At the time I believe I did. Without looking at the notes I can't be positive.

Q. Did that then ultimately sometime in October break down into an open sore?

A. I am almost sure it did, yes, sir.

Q. Now, he came to you with a history, in other words, he told you, Mr. Gallick did, when he came to you that he had been bitten by an insect on the back of the leg?

A. Yes, sir.

Q. Did he ever give you any history of having been bitten by an insect or anything else near the left armpit?

A. No, sir.

[fol. 385] Q. Then what was the next open sore that developed on some other part of his body following this one at the left armpit?

A. I would have to look at some of my notes and chart. I don't quite remember.

Q. Well, did others shortly follow?

A. Yes, others followed, yes, sir.

Q. Did he ever give you any history of having been bitten by an insect or anything else at any other place on his body where another sore developed?

A. No, sir.

Q. Now, do I understand, Doctor, that you did take blood cultures from Mr. Gallick after he got in the hospital, is that correct?

A. Yes, sir.

Q. Did you take at least several?

A. Yes, sir.

Q. Over a period of time?

A. Yes, sir.

Q. Were those all negative?

A. They were normal.

Q. By that they showed no infection in the blood stream?

A. That's right.

Q. When did you take the first smear from anyone of those open sores?

A. I am sure very shortly after he came in the hospital. [fol. 386] I will have to look it up. I don't remember the exact date.

Q. Well, did you take the first one from the area on the back of his leg?

A. Yes, sir.

Q. And can you tell us what if anything showed up in that culture?

A. Well, the smear, the culture, the smear and also the culture from the back of the large ulcer he had behind his left leg showed multiple organisms.

Q. You have a report on it there, don't you, Doctor, just turn to that and tell us exactly what it was?

A. 9-20-54.

Q. Don't you have one for September 18th there, Doctor?

A. 9-20.

Q. Is that the first one you find?

A. Yes, sir.

Mr. Dudnik: September 20th?

A. Yes, sir. Two days after he came in.

Q. What organism showed up in that culture?

A. Well it showed—escherichia was one of them, and pseudomonas type another.

Q. Did it show any staphylococcus?

A. No, I don't read any staphylococcus or strep here on this report.

Q. In other words, the culture of September 20, 1954, did [fol. 387] not show any staphylococcus, is that correct?

A. Not that I can see here.

Q. Well, you have the bacteriology report right there in front of you.

A. The writing is pretty terrible, but I don't see it.

Q. I couldn't pick out any either, but you are more familiar—

A. I don't see any staph or strep on these.

Q. Now, this escherichia that you mentioned, is that escherichia?

A. Yes.

Q. And is that a type of bacteria?

A. Yes.

Q. Is it one that ordinarily is rather easily killed by medication?

A. No, I don't think so.

Q. Well, is it grand positive or grand negative?

A. It is grand positive.

Q. It is?

A. As far as I know.

Q. Isn't it a fact it is grand negative?

A. It may be.

Q. Grand negative ordinarily is more easily killed than others, are they not?

A. No, you can't say that.

[fol. 388] Q. What medication did you prescribe for that, if any?

A. May I look on this chart?

Q. Yes.

A. Of course, one of the old fashioned remedies, of course, is hot packs to start out with, heat, besides other drugs. We ordered some erythromycin, which is one of the family of anti-biotics. And we ordered local some varidase packs to the ulcer.

Q. When was the date of your next smear and culture?

A. 10—I have here—10-30.

Q. 10-30, was that?

A. No, this was a stool culture. I don't have another culture here that I know we took from the ulcer per se.

Q. Do you have any cultures that you took from any of the other ulcers during his first admission?

A. No, that was the only one, and a stool culture.

Q. This escherichia is something that is found in quite a few different places, isn't it, Doctor?

A. Yes.

Q. It is found in the soil?

A. It can be.

Q. It is found on the surface of the human body?

A. Not to my knowledge on the surface of the human body. Some places in the human body, but not on the surface, let's say. It is found in stools, and so forth. So it can [fol. 389] be found on human bodies.

Q. It is naturally inside of our bodies, isn't it, in our digestive tract and intestinal tract?

A. It can be found in some, yes.

Q. There was nothing in your medical studies which showed to you just when this escherichia, that bacteria, got into this ulcer, was there?

A. No.

Q. It could have gotten in there the day before the smear was made, the week before, any other time, is that correct?

A. I don't know, to be truthful with you.

Q. You just don't know?

A. That's right.

Q. Will you turn to your notes for October 26, 1954.

A. You mean our daily sheets, do you mean the yellow sheets?

Q. I think you have doctors notes and entries there, don't you?

A. Yes, sir, October 26th?

Q. Yes.

A. Yes, sir.

Q. Is there a notation entered there that suggests pyoderma gangrenosa that may be due to a systemic infection?

A. There is a note down here that is an impression of one of the doctors that came in to see him.

Q. Will you read what that is?

[fol. 390] A. Well, seen in consultation by Doctor Kauf-

man. Doctor Kaufman is the pathologist at the time, he was the pathologist who had a part-time job at Marymount, but his main department was over at City Hospital.

Do you want me to read the whole thing?

Q. Yes, if you will, please.

A. The writing is a little hard to read. He has down here Doctor Moss, who is an intern. Fungus suspected. Infected, systemic infection. Then he has down after that, Weber Christian disease of panniculus. Panniculus means the fatty tissues that we have. Suggested by Doctor Ippolito.

Dermatologic textbooks describe type Pyoderma-gangrenosa. Then he has down here, due to systemic infection, by yeast or amoebae, and toxins identical to this case, bloody dysentery, evidence of systemic involvement.

Asthenia means thinness of the person. Stool specimen negative for amoebae. Positive for blood. Repeat specimens and slides for yeast and other pathogens, and bar enema, and patient to have biopsy of newest lesion in arm. M. Moss.

Q. Now, did I understand you to say in your direct testimony that on or around November 23, 1954, you described his condition as having several lesions of the skin, that is, ulcers of the skin, specific etiology unknown?

A. Specific etiology unknown, yes.

Q. Etiology means what, Doctor?

[fol. 391] A. Etiology means the specific cause of a condition. May I further explain what I am talking about?

Q. Well, let me ask you another question which may help get a specific definition.

Do you mind if I read from two medical dictionaries? First is American Illustrated Medical Dictionary, by Doreland, under the word "etiology"—"the study or theory of the causation of any disease; the sum of knowledge regarding causes."

And from Blakiston's New Gould Medical Dictionary, second edition, the word etiology, "the science or study of the causes of disease, both direct and predisposing and the mode of their operation."

Do you agree with those definitions of the word etiology?

A. Yes, to a certain degree, yes.

Q. To what degree?

A. To make it a little more illustrative, may I use this case as an illustration?

Q. No.

A. Or should I take another case?

Q. I just want your definition of the word etiology.

Mr. Dudnik: I think the Doctor may—

The Court: The Doctor has already given that definition. [fol. 392] Mr. Leasure: All right, I will pass that.

Q. Now, going to the second hospital confinement, Doctor, starting in January of 1955, did you make a culture on February 9, 1955?

A. What was that date again, Mr. Leasure?

Q. February 9th, '55.

A. Yes, sir.

Q. Did you find, or was there found any escherichia bacteria at that time?

A. No, not at this time, no, sir.

Q. So that bacteria apparently had cleared up, then, is that right?

A. Yes, sir.

Q. Can you tell from these reports which of the ulcers the smear was taken from, from which ulcer?

A. This is from the back, this smear.

Q. What do you mean the back?

A. The back of his body.

Q. I wasn't aware that he had an ulcer on his back at that time; did he?

A. I don't remember, but you asked me where it was taken, the smear here, and it says "back."

Q. Well, upon his admission the second time—and will you turn to your history and physical examination—does [fol. 393] that show a diagram where he then had open sores?

A. Yes, sir.

Q. And what does that diagram show?

A. It shows that he had ulcers in different parts of the body here.

Q. It shows one under the left arm?

A. Yes, sir. Left popliteal region, that is where he originally had it. Left Achilles tendon, that is behind the heel back here.

Q. And one on the right leg?

A. And one on the right knee, yes, sir.

Q. What did this smear—does it show any on the back? That is what confuses me a little bit.

A. He probably meant back of the knee, I imagine, rather than the back or upper part of the body.

Q. What did that smear show on February 9th, 1955?

A. Few candida albicans overgrown with Proteus species or organisms.

Q. That smear shows things entirely different than the smear taken back in September, is that correct?

A. Yes, it would.

Q. Well, it does, doesn't it?

A. Yes, yes.

Q. It doesn't show the same bacteria found back in September; it shows new or different organisms?

[fol. 394] A. Yes.

Q. What are candida albicans?

A. Well, as far as I know, they are yeast type of organism.

Q. All right. Overgrown with Proteus species, what are those?

A. Proteus is a green type of bacteria. When you have an infection of it, it has sort of a greenish pusy growth.

Q. Is this yeast-like thing something that can come through the air, this candida albicans, if you know?

A. Not so much the air as contamination.

Q. On the surface?

A. It is possible.

Q. Anything else you might touch?

A. It is possible.

Q. Now, Doctor, I could take a lot more time on these hospital records, but I am not going to, in the interest of saving time.

Let's get back, Doctor, to this hypothetical question that you were asked this morning.

Do you recall that to mind now?

A. The general part of it, the part that I have to know, yes.

Q. The part that is important to you?

A. Yes, sir. I think it is important to the case.

Q. Will you then tell us exactly why you say in response

[fol. 395] to that hypothetical question that there was a causal relationship between the conditions and the bite set out in the question, and Mr. Gallick's condition?

A. I answered that yes to Mr. Dudnik's question this morning because as he put it in his hypothetical case, he wanted me to assume that here was a normal individual who had worked for four straight years on a tough job, who had only been to a doctor once in his lifetime for something incidental. He never lost any time.

He had no history of any systemic infections, because he hadn't been to a doctor in four years, and I had to assume that.

This man was working near a rat-infested pool, with dead rodents in it, and bugs flying in the air. The man was bitten by an insect, and the conditions that followed thereafter. I don't know how I could assume anything else, that the causative agent was this insect bite.

Now, what etiological agent, what bacteria this bug was carrying, I have never proven, and to me I believe it is only incidental.

I know from the history that this man was bitten by a bug, and this bug was in the area of a rat-infested stagnant pool. And I have to assume that, as a Doctor, that is my professional opinion, yes.

Q. Are you finished? Fine. I take it, then, that what you [fol. 396] are telling us is that in view of the assumed facts that you have just pointed out—

A. Yes, sir.

Q. —and you don't know whether it is right or not about the man's history and perfect condition of health—in view of those, you hear these facts given you by Mr. Dudnik, and since you have not found any medical reason that would exclude the possibility of a bug bite causing this, you then assume that that is the cause, is that about it?

A. Yes.

Q. Now, along that line, Doctor, you are assuming, too, are you not, that some bacteria were introduced into this man's body at the time of the bite?

A. Yes.

Q. As distinguished from bacteria getting into a pimple or sore later on through any mechanical means, is that correct?

A. What do you mean by later on by mechanical means? I don't understand that.

Q. By scratching it or rubbing it, knocking the head of it off, and at that time the bacteria getting in?

A. To me that question at the time and after was not important, to me.

Q. You don't know either way medically, do you?

Mr. Dudnik: No, that isn't what he said, your Honor. Objection.

[fol. 397] A. To me.

Mr. Leasure: I am asking him.

Q. You don't know either way medically whether the bacteria got in there at the time of the bite or later on?

A. I have to assume, then, if I have to be pinned down to one answer.

Q. You are assuming that, then?

A. I believe it. I am not assuming it, that the bacteria, that this infected insect was carrying around at the time, at the time that Mr. Gallick was infected, that it was injected in him at that time.

Q. You are assuming, are you not, Doctor, that the insect itself was infected first, you are assuming that?

A. I believe it.

Q. Well, how do you know?

A. Because of the course of the events, from the time from what you have told me yourself.

Q. Don't take anything—

A. And from what Mr. Gallick has said.

Q. Don't take anything—

Mr. Dudnik: Let him finish, please. Your Honor, I ask that the doctor be permitted to answer the question.

Mr. Leasure: He is saying he assumed, from something I told him. I did not tell him anything.

[fol. 398] A. All right, you did not tell me. Will you rephrase your question, please, Mr. Leasure?

Q. All right. Medically, Doctor, don't we have these three possibilities? Assuming that an infection got into this portion of Mr. Gallick's leg at any time—

A. Yes, sir.

Q. We have the possibility if he was bitten by an insect, let's assume that he was bitten by an insect; we have the possibility, do we not, that the insect itself was infected.

Secondly, we have the possibility that the insect itself was not infected but that the bacteria was on the surface of Mr. Gallick's skin, and got in there from that source at the time of the bite.

We have the third possibility, do we not, that the bite produced a red nodule which was then mechanically disturbed by scratching or rubbing and the bacteria got in at that time.

Aren't those the three possibilities?

A. I don't think—I don't think they are a possibility.

Q. All right, let's go—let me ask you this question, then: You are giving us the answer that you did when of course you do not know what kind of an insect it was, if any, is that correct?

Q. I can't say that. I believe that. I believe that he was bitten by an insect, and that these things occurred [fol. 399] thereafter.

Q. I know you believe that, Doctor. But I am trying to find out—

A. In my professional judgment I believe it.

Q. All right, that is your conclusion.

A. Right.

Q. Now, I am trying to find out what facts you are basing that on, or what assumptions you are basing that on?

A. In any case, in any patient, regardless of this patient, you have to take into consideration—

Q. Let me ask you a question, Doctor.

Mr. Dudnik: Just a moment.

Q. And we will get along a lot faster.

The Court: Just a minute.

Mr. Dudnik: No, your Honor.

The Court: Just a minute, I will conduct this now. I think the question was asked and you haven't permitted the Doctor to answer the question.

Mr. Leasure: Read my question.

(Last question read by the reporter.)

Mr. Leasure: That is not a question, your Honor.

Mr. Dudnik: It certainly is a question.

[fol. 400] The Court: I will determine whether it is a question. The statement there is what assumptions.

Mr. Leasure: Well, I will withdraw it and ask a question. It wasn't a question. It was a statement. I will withdraw it and ask a question.

The Court: Very well.

Q. Doctor, in the hypothetical question given to you by Mr. Dudnik, there was no identity of the kind of insect, was there?

A. No, not the identity of it.

Q. As to type or species?

A. Right.

Q. You don't know medically, do you, what kind or type of insect may have bitten Mr. Gallick?

A. Not what type or what species or what family, no, sir.

Q. You don't know where any such insect might have lived, do you, or its habits?

A. Whatever insect—

Q. Just answer my question.

Mr. Dudnik: Just a moment.

A. I can't answer it then.

The Court: You answer the question to the best of your ability, Doctor.

[fol. 401] A. Will you rephrase that again?

Mr. Dudnik: No, answer it to the best of your ability, Doctor.

The Court: Will the reporter read the question and then you answer it to the best of your ability.

(Last question read by the reporter.)

A. I do know.

Q. Where do you get those facts from?

A. I get it from the history of the patient. The patient told me that he was bitten by an organism, by an insect, and we do know that stagnant pools of water, particularly that are infected and have rodents, rats, in them, that insects will go to that area more so than in a dry clean area.

Therefore, I believe that this insect was living in that region where Mr. Gallick was working at the time, although I do not know what type of insect it was.

Q. Then can we agree that whatever conclusion you are expressing on that subject is based upon the statement that you have just made, that was intended to be a complete statement, was it, Doctor?

A. Yes.

Q. You did tell us this morning, did you not, Doctor, that you are not an expert on insect life, and frankly don't know anything about it?

[fol. 402] A. No, I am not.

Q. You don't know anything more about it than any of the rest of us?

A. I don't think so.

Q. So you don't know what types or kinds of insects may be attracted by one condition, as contrasted to another, is that correct?

A. I do know that stagnant pools, infected pools, will attract insects, yes.

Q. What kind, Doctor, what kind?

A. Any type of insects, even flies like to be in infected areas.

Q. Flies, yes.

A. And mosquitoes.

Q. Mosquitoes, what else?

A. Yes.

Q. What else?

A. Any type of a bug.

Q. Just any type at all?

A. That's right.

Q. That is your opinion?

A. Yes, sir.

Q. You do not know, do you, Doctor, where this insect had been, where it was going to, or how long it had been there, is that correct?

[fol. 403] A. Do you mean where it came from, Mr. Leasure?

Q. Yes, where it had been five minutes, ten minutes, fifteen minutes before?

A. I believe that it was in the area in which Mr. Gallick was working.

Q. What facts if any do you have which make you believe that?

A. My medical opinion. Why should I think that this poor insect came from ten miles down rather than coming from an infected cesspool of water?

Q. That depends, doesn't it, Doctor, on the habits of that particular insect?

A. Insects don't fly too fast. I don't know how fast they fly, but I would believe that it is more likely that that infected insect was in that close vicinity where Mr. Gallick was working and with the conditions that were there, rather than I should believe that it came from a mile or two or three miles down the track and just came there and bit him. I have to, I have to take the history that the patient gives me.

Q. You are going back to the patient's history, then?

A. The history I have to believe in any case, and the conditions at the time.

Q. But without having any precise or detail or scientific knowledge as to the habits and life of insects of the various species or kinds, is that correct, Doctor?

[fol. 404] A. I have no scientific—I am not an authority on that, no.

Q. And except for what Mr. Gallick told you, and what Mr. Dudnik assumed in his question, you have no way of knowing what it was that Mr. Gallick felt in his trousers following this bite as he described it, is that correct?

A. I have the history. I have the locality he was working. I have the condition as I found it on the first time, and the condition as it progressed to the condition he is in today. That is what I base my diagnosis and history on.

Q. You say you have the history and the facts that were given you where in the hypothetical question, plus your medical knowledge which started on September 16, 1954?

A. Yes, sir, '54.

Q. I am trying in these questions to distinguish between facts that you have been given either by the patient or the attorney here to assume, and what facts you have independent knowledge of, Doctor, do I make myself clear on that?

A. Well, may I say something, Mr. Leasure?

Q. Well, you can answer my question. Are we clear on

the distinction between assumed facts or related facts, and the facts that you have personal knowledge of?

A. Yes, sir.

Q. When this man came to you on September 16, 1954, you observed an open sore on the back of his leg?

[fol. 405] A. Yes, sir.

Q. And except for the history that the man gave you, there was no way for you to tell medically, was there, what had initiated or started that open sore?

A. The history in any case—

Q. No. I am asking you, I say except for the history that was related, you couldn't tell—

A. From the history and what followed thereafter, yes.

Q. But you had to have the history in order to reach any conclusion?

A. Oh, yes, absolutely, yes.

Q. Except for that you could have reached no conclusion medically from your examination?

A. At the time in my office you are speaking of or at the end of the time—

Q. September 16, 1954, when you first saw him?

A. Yes, sir.

Q. In other words, except for what he told you, that place on the back of his leg looked like any other open sore that you might see on another patient?

A. Not any open sore. It was tremendous.

Q. Well, except as to size?

A. Yes.

Q. But as far as the other appearance was concerned, it looked like an open sore from any cause?

[fol. 406] A. Yes, sir.

Q. And I might get an open sore if I fall down and skin my knee and knock some of the skin away, and don't take very good care of it and it starts to get a little pusy, would that be an open sore?

A. Yes, sir.

Q. Now, etiologically, Doctor, and medically, can you state specifically why this first ulcer, first sore, failed to heal upon treatment?

A. As I mentioned before, it is my professional opinion that Mr. Gallick developed this tremendous ulcer in the back

of his left leg because of an insect bite that he received while he was working. To me that is the actual cause. Now, the exact etiology, what organism was this insect carrying, and injected into Mr. Gallick, we have never found.

It may be because of our shortcomings as doctors that we do not have the facilities for isolating this particular organism. That does occur in medicine.

Q. Doctor, are you finished?

A. Yes.

Q. If you haven't isolated an organism, how do you know that it is an organism?

A. Because of the history, the way this is followed. When he went in the hospital, we ruled out diabetes, we ruled out syphilis, we ruled out cancer, we ruled out nutritional [fol. 407] diseases. We ruled out ulcerative colitis. And there has been a progression toward the worse.

You say did he have ulcerative lesions while he was in the hospital? Yes, he did, from his left leg to his right axilla, to his neck, to his other leg.

Because I have a shortcoming or maybe other doctors have a shortcoming of not being able to isolate an organism that he may still have at this time, does not mean that I can't say that there is not an organism still in this man's body that was put in there by the insect.

Q. All right. You—

A. We have to try—

Q. Go ahead.

A. — in medicine, the normal findings we have against the abnormal or positive findings we have. That's the way we make a diagnosis. No, we haven't found that particular organism as yet.

Q. You say that you cannot say that there is not an organism there. I am trying to find out how you can say medically that there is one if you haven't found it?

A. Because of the progress of this thing. What is making this lesion that started with the left leg, going over to the neck, or to the right axilla, the right armpit, and the other leg, and this man started in 1954. This man was brought here that I saw yesterday, still has an ulcer in his [fol. 408] right arm, which I believe in the future will have

to come off. That's why I believe that this man still has an organism going on.

Q. Do you know medically why and exactly how these other ulcers developed on the other parts of his body?

A. Yes, I think he gets organisms that go to these other different parts of his body and set up this same type of a reaction, as we are seeing. This—

Q. Go ahead. I don't want to interrupt you.

A. How do they get there?

Q. Yes.

A. Usually they get there through the blood stream.

Q. Have you found any organisms in the blood stream here?

A. I said that before, just because we have not been able to pick up an organism from his blood stream or culture, that does not mean that he doesn't have one there at the present time.

Q. That's what you are basing your testimony on?

A. Not only that. We know in medicine that other diseases that we haven't been able to find for years and years and years, eventually scientists have found; although we knew years ago the types of skin lesions that people would use to get years ago, tuberculous lesions, leprosy lesions, poliomyelitis, for years no one could isolate the organism. Then scientists did isolate them. That's why I can't categ- [fol. 409] gorically say this man does not have an organism and infection in his blood stream. I cannot say that.

Q. Doctor, not all bodily diseases come from organisms, do they?

A. It depends on what type of bodily diseases you are speaking of.

Q. Exactly. Some are caused by organism, some are caused by something else?

A. Like what, though?

Q. Well, let's take diabetes, that is not caused by an organism, is it?

A. But diabetes and some of your other diseases have all been ruled out, to the best of my knowledge.

Q. Well, all organisms have been ruled out to the best of your ability and knowledge, too, haven't they?

A. To a certain degree.

Q. Can we agree that undoubtedly there are bodily diseases that medical science—and I don't mean by organisms—I mean the other kind that medical science hasn't yet discovered, and knows little if anything about?

A. Nothing like this man has ever been written up in medical literature.

Q. Have you ever had another case like Mr. Gallick in your practice?

A. No, sir. I hope I never get another one.

[fol. 410] Q. I do, too.

Mr. Leasure: That is all, Doctor.

The Court: Any questions, Mr. Dudnik?

Mr. Dudnik: Your Honor, I may have only three of four.

The Court: Proceed.

Mr. Dudnik: If you feel in the middle you want to call a recess, if I go longer—

The Court: I heard the doctor express a desire to be somewhere at 3:30?

The Witness: Yes, not me, my patients.

Mr. Dudnik: I only have a couple of questions.

Redirect examination of Dr. Victor Ippolito.

By Mr. Dudnik:

Q. Let me have the second hospital admission, please. Doctor, I ask you to read the provisional diagnosis on the first sheet of the second hospital admission?

A. Second hospital admission was January 4th, 1955, and my provisional diagnosis or entering diagnosis of the patient to the hospital is pyoderma-gangrenosa, secondary to insect bite.

Q. What is the meaning of provisional diagnosis?

A. It is the impression that we have of a case as they are admitted to the hospital, and sometimes we may admit [fol. 411] a patient with what I will say is an ulcer of the stomach, but we ventually find out that this patient has cancer of the stomach and not just an ordinary ulcer. That is what I mean by provisional diagnosis.

Q. Doctor, following that provisional diagnosis, you observed him for some 14 or 15 months, did you not?

A. That's right.

Q. You made your tests and studies and did everything else by way of treatment?

A. Yes, sir.

Q. Was your final diagnosis—

A. Final diagnosis—

Q. —any different than the provisional diagnosis?

A. Absolutely not. Exactly the same.

Q. Doctor, did you rule out cancer of the lung?

A. Yes, sir.

Q. Did you rule out all cancer?

A. Yes, sir.

Q. Doctor, how many times did you see this man?

A. Well, I saw him every day for all the time he was in the hospital, except for once or twice I took a short vacation or when I was with the Cleveland Browns, and then other doctors that I left saw him. I don't think there is any question I saw him between 550 and 600 times, or more. [fol. 412] Q. Doctor, do you know Doctor Hammond, Carl Hammond?

A. Very well.

Q. Tell us whether or not you learned that he examined Mr. Gallick on behalf of the B & O Railroad?

A. Yes, he did. I know that.

Q. Following that examination did he consult with you?

A. He talked to me, yes, sir.

Q. Did he tell you what his opinion was after his examination—

Mr. Leasure: Finish the question.

Mr. Dudnik: Just a moment. Don't answer that because Mr. Leasure rose to object.

Mr. Leasure: Are you finished?

Mr. Dudnik: Read the question. I don't remember now whether I am finished or not.

(Question was read by the reporter.)

Mr. Leasure: I am objecting, of course.

Mr. Dudnik: I don't think he should give reasons.

Mr. Leasure: Obviously, if Dr. Hammond were physically able and not in the hospital with a heart attack, as

I understand it, we would have him down here and tell his own story.

[fol. 413] Certainly it shouldn't come from this man.

Mr. Dudnik: Mr. Leasure, will you admit Dr. Hammond's report in evidence?

Mr. Leasure: I would like to have Dr. Hammond here so he can explain all aspects of the case.

Mr. Dudnik: Will you let the jury read the letter Dr. Hammond sent you?

Mr. Leasure: Not the letter itself, no, sir.

The Court: Just a moment. There was a question asked of the witness and there was an objection to the question. The question called for a yes or no answer. The witness may answer yes or no.

He cannot testify to any conversations that were had between this witness and Dr. Hammond.

Mr. Dudnik: Will you answer that question yes or no.

A. Yes, he gave me his opinion.

Q. Did Dr. Hammond also give you his diagnosis?

A. Yes, sir.

Q. Now, one more question or two. Can you give a prognosis—withdraw that.

One more question. You have heard, you have been asked [fol. 414] many questions by me and many questions by Mr. Leasure. Do you still hold to the opinion you gave this Court and jury?

A. Yes.

Mr. Dudnik: That is all, Doctor.

The Court: Anything further, Mr. Leasure?

Mr. Leasure: Just one question in view of one of the questions by Mr. Dudnik.

Recross examination of Dr. Victor Ippolito.

By Mr. Leasure:

Q. You found abscesses on the right lung there by X-rays, is that correct?

A. Yes.

Q. Did you do anything more about that, did you do any more about that?

A. No. We had him on anti-bioties and just took X-rays to follow the course of it. We saw no point, we were positive we were not dealing with a cancer. As long as we were not dealing with cancer, and the treatment of abscesses of the lung are different today than they used to be years ago, because of anti-bioties. So we kept him on anti-bioties, hoping that that would clear up his abscesses.

Q. These were encapsulated abscesses, that is, pus pockets on the lungs?

A. That's right.

[fol. 415] Mr. Leasure: That is all.

Mr. Dudnik: Thank you very much, Doctor.

The Court: Ladies and gentlemen of the jury, there will be a brief recess.

You will return to the jury room, once more with the admonition that you do not talk to anyone about this case, not even amongst yourselves.

(Thereupon a recess was taken.)

Mr. Dudnik: Dr. Anderson, will you be sworn, please?

[fol. 416] Thereupon the plaintiff, further to maintain the issues on his part to be maintained, called as a witness Dr. Robin Anderson, who, being first duly sworn, was examined and testified as follows:

Direct examination of Dr. Robin Anderson.

By Mr. Dudnik:

Q. Dr. Anderson, will you please give us your name in full?

A. Robin Anderson.

Q. Where do you live, sir?

A. South Euclid, Ohio.

Q. Address, please?

A. 3822 Freemont Road.

Q. Doctor, are you a licensed practicing physician and surgeon in this community?

A. I am, sir.

Q. Will you first please tell us what medical school you attended?

A. Harvard Medical School.

Q. When did you graduate from Harvard?

A. 1943.

Q. Following that did you have any other schooling?

A. No further schooling, no, sir.

Q. Following that what did you do, Doctor?

A. I had two years of surgical training at Children's Hospital in Boston.

[fol. 417] Q. Following that what did you do?

A. I spent three years in the Army as a plastic surgeon.

Q. Where in the Army did you spend that time?

A. I spent one year in the European theatre, and the remainder in the United States in the Plastic General Hospital.

Q. During that three years in the Army service, did you perform few or many plastic operations?

A. Many.

Q. Doctor, following your service what did you do?

A. I returned to surgical training at Ohio State University Hospital.

Q. And how long were you there, Doctor?

A. Two years.

Q. Following that what did you do, Doctor?

A. I went to Washington University in St. Louis for two years for plastic surgery training.

Q. Following that, Doctor, what did you do?

A. I joined the staff of the Cleveland Clinic as head of the Department of Plastic Surgery.

Q. Are you now head of the Department of Plastic Surgery at the Cleveland Clinic?

A. Yes, sir.

Q. And how long have you been head of that department, sir?

A. Just short of 8 years.

Q. Doctor, are you a member of any medical societies?

[fol. 418] A. Yes, sir.

Q. Will you tell us what they are?

A. I am a member of the local Academy of Medicine, the Cleveland Surgical Society, the Ohio State Medical Society, the American Medical Association, the American College of Surgeons, the American Society for Plastic and

Reconstructive Surgery, the American Association of Plastic Surgeons, the Plastic Surgery Research Council, and the Society of Head and Neck Surgeons.

Q. Doctor, in order to obtain membership into some of these societies, do you have to take tests?

A. No, sir.

Q. How do you get into some of these societies, Doctor?

A. You are admitted by qualifications, often in terms of having taken the American Board in the specialty, which is a qualifying examination, but separate from the societies, and by having had a period of training plus practice.

Q. And do you have to take an examination to take the American Board?

A. Yes, sir.

Q. What does that examination consist of, Doctor?

A. It is based first on adequate training. Then on the presentation of a group of previously-prepared cases, and then a 3-day examination.

Q. You took such an examination and passed it, I take it?

[fol. 419] A. Yes, sir.

Q. Doctor, have you written any papers in connection with your surgical specialty?

A. Yes, sir.

Q. And have those papers been published?

A. Yes, sir.

Q. In the medical periodical?

A. Yes, sir.

Q. Doctor, I will ask you if you had occasion to examine and treat the patient in this case, James Gallick?

A. I did, sir.

Q. Doctor, I am going to hand you all of the records of your hospital, so that you may refer to them in your testimony as you find it necessary.

Can you tell me approximately when you first saw Mr. James Gallick?

A. I can give you an accurate date, sir. July, 1956.

Q. At that time did you take a history from him?

A. I did not see Mr. Gallick on his initial entrance to the Cleveland Clinic Hospital. He was admitted on the dermatology service, and I saw him in consultation and accepted him as a transfer from that department.

Q. He was then transferred from the dermatology service to your service?

A. Yes, sir.

[fol. 420] Q. And when you first saw him did you take a history or did you not, Doctor?

A. I did.

Q. Will you briefly tell the jury what the patient told you as to how he got his original condition or sustained his original condition?

A. He stated that he had been injured approximately two years previously while working for his employer. He stated that he had been bitten by some insect which had progressed steadily to the condition in which I first saw him.

Q. Now, when you said the word injured, did you mean that in connection with the bite, or is that something else?

A. In connection with an insect bite.

Q. You call that an injury, do you, Doctor?

Mr. Leasure: I think I will object to that, your Honor.

A. Yes.

Q. Can you tell us—

Mr. Leasure: Just a moment, Mr. Dudnik. Don't try to gloss over this.

Mr. Dudnik: I am not trying to gloss over anything.

The Court: The last question and answer will go out.

Q. Doctor, what is a trauma?

[fol. 421] A. Trauma is any form of injury.

Q. After receiving the history that you did receive from the patient, can you tell us or not whether in your opinion it was traumatic in origin?

Mr. Leasure: Just a moment. I object unless the question is clarified as to whether the witness is being asked to interpret the patient's story.

If that is the question I am objecting to it because that of course would be improper.

Mr. Dudnik: The history is something that the Doctor is permitted to testify to, your Honor, and once he has had—

The Court: There is no question about the Doctor being permitted to testify to this history as given to him by the patient.

Mr. Dudnik: Once he has obtained the history I believe I have a right to ask him whether he considers whatever the man told him to be of the nature of a trauma or not. That is the reason I asked him.

The Court: He can only relate what the patient told him. I think he has already stated that he suffered an insect bite. [fol. 422] Mr. Dudnik: Is your Honor sustaining the objection to my last question?

The Court: I would like to hear the last question. Read the question.

(Last question was read by the reporter.)

The Court: He may testify whether in his opinion it was traumatic in origin.

Q. Will you answer that question, Doctor?

A. I would say yes, an insect bite is a form of trauma.

Q. Doctor, did you following or in connection with your taking a history examine the man?

A. I did, sir.

Q. Will you tell the jury, please, and the Court, what your first examination disclosed or revealed to you?

A. The patient was obviously a very ill person, in poor physical condition.

The outstanding feature of his examination was a number of areas of ulceration on his legs, open sores which were extremely dirty.

Q. And when you say dirty can you explain what that means?

A. They were dirty in that these wounds were covered with necrotic material, and what we call exudate or pus, which is the more common name.

Q. How many areas, if you can recall or can tell us, how many of such ulcerated areas were there on this body when [fol. 423] you first saw him?

A. I would prefer to check that, sir.

I would say that we were probably dealing with a matter of 4 or 5 areas, some of which ran together, but if we talk about discrete areas, it was probably that number.

Q. In which part of his body was the largest ulcerated area, Doctor?

A. On the thighs.

Q. Doctor, following your examination did you as his physician determine that something ought to be done for him medically or surgically?

A. I did, sir.

Q. And what was it that you determined should be done?

A. Well, our initial treatment of this man was to take him to the operating room and surgically clean the involved areas.

Q. And is that what you did the first time?

A. Yes.

Q. Now, will you tell us what work or what you did in the surgical cleansing of these areas, or surgical cleansing of these areas?

A. The operative procedure consisted of attempting to remove the surface, the actual surface of the ulcers in an effort to get to normal appearing tissue. In other words, tissue which looked as though it was alive.

[fol. 424] Q. Did you have to cut away then some flesh and tissue, Doctor?

A. Yes, sir.

Q. Was there much or little that you had to cut away?

A. A large amount.

Q. And was that in more than one area that you did that?

A. Yes.

Q. And of course it was necessary to put him under a general anesthetic?

A. Yes, sir.

Q. Can you tell me how long that first surgical procedure took you, Doctor?

A. Without consulting the record I—

Q. I would appreciate it if it isn't too much trouble that you consult the record. If you are going to have any difficulty, Doctor, I will skip the question, Doctor.

A. It would be difficult to find the right operative note, sir. I would guess probably an hour.

Q. Doctor, can you tell us following that surgery if Mr. Gallick was in pain?

A. He was.

Q. And was this severe, slight, or medium pain?

A. Severe.

Q. Now, after you did perform that operation, did you as his physician do anything else following that?

[fol. 425] A. Yes, sir.

Q. Will you tell us what you did following that?

A. He remained under my care for approximately two years, during which time he had a great deal of surgery carried on.

Q. Now, Doctor, without going into the complete details of what you did during the two years that he was under your care, did you at my request make a summary of the amount of operations or the number of operations that you performed?

A. I did, sir.

Q. How many plastic operations did you perform?

A. He had 26 operative procedures, of which—

Q. I am sorry, go ahead, Doctor.

Q. —of which 9 were skin grafts, and 2 were procedures done by someone else which were amputations.

Q. You have told us about 26, and you mentioned 11; what were the other 15 operative procedures?

A. The other procedures consisted of cleansing of these wounds, what we call debridement, such as I described for the initial procedure, and dressing under anesthesia because of the pain associated with carrying out these dressings.

Q. Now, the 9 plastic operations which you performed, did you have to use donor sites from his own body?

A. Yes.

Q. Where did you take the skin that you used to apply in your plastic surgery?

[fol. 426] A. Anywhere that we could get it.

Q. Well, what part of the body then did you go to, what areas did those 9 skin grafts require as donor area?

A. Uninvolved areas of leg, abdomen, back; I don't think we took any from the arms, but that's the only place we didn't.

Q. In other words, you took skin from all those parts of his body to apply to the ulcers which you were covering?

A. Yes, sir.

Q. Doctor, did any of those skin grafts take?

A. Yes.

Q. Which ones?

A. Initially a number of them took, and at various times in his course we thought we were obtaining a moderate degree of coverage, but ultimately they did not survive satisfactorily.

Q. When you say they did not survive, what do you mean, can you explain that, Doctor?

A. In the presence of debris, purulent material, pus, a skin graft is very prone to also be dissolved and eaten away as the other tissue was, and this occurred.

Q. Doctor, on each of these 9 operative procedures involving skin grafts, were they all done under general anesthetic?

[fol. 427] A. Yes, sir.

Q. Were they done on separate occasions?

A. Yes, sir.

Q. And following that can you tell us whether or not the patient was suffering pain?

A. He was.

Q. And did that pain continue from operation to operation?

A. It did.

Q. And was it of a mild, moderate, or intense nature?

A. Most of the time it was severe.

Q. Doctor, was he given medication for the relief of pain?

A. Yes.

Q. What type of medication?

A. Various narcotics.

Q. Doctor, what would be the appearance of the grafted area after the graft is on?

A. If there is no graft remaining, it becomes exactly like any of the other ulcers.

Q. Did you have to do a debridement before you did some of these grafts?

A. Every time.

Q. Was that another operative procedure, Doctor?

A. Well, that fits into the same type of operation.

Q. Can you tell us just a little bit how you take skin from one part of the body and apply it to ulcerated area?

[fol. 428] A. With this type of skin graft, which is called a split skin graft, it is a thin piece of skin which is literally shaved off with a razor blade. It happens to be a specialized razor blade, but it is just as sharp as a razor blade.

And the graft is removed with this blade, so that the full thickness of the skin is not taken. The skin is split, and this piece of skin that has been removed is then placed on the area we want it and usually stitched in place.

Q. And did you have to do stitching after each one of those grafts?

A. Yes, sir.

Q. And was there much or little stitching, Doctor?

A. Usually considerable.

Q. Is that stitching removed or does it dissolve?

A. Usually removed.

Q. Did you have to remove stitches from him on 9 different occasions?

A. I would think so, sir.

Q. Is that your best recollection?

A. Yes, sir.

Q. Was that to this man a painful procedure?

A. It usually was, yes, sir.

Q. Did you have to do some of that under anesthetic?

A. I don't remember this, sir.

Q. Now, then, going now to these other operative pro-[fol. 429] cedures for the bandaging, why would a man have to go under a general anesthetic for bandaging, Doctor?

A. Because he had such severe pain that even with narcotics we were unable to take his dressing off in bed, particularly early in his hospital stay.

Q. Then did you because of that take him to surgery and put him under a general anesthetic?

A. Yes.

Q. To do that?

A. Yes.

Q. Following that will you tell this Court and jury whether he was in severe pain?

A. He was, usually, yes.

Q. Doctor, did there come a time when further surgery was performed, and I am referring to amputation?

A. Yes.

Q. Was that done following a consultation which you had with other men?

A. Yes.

Q. Will you tell me about the first amputation?

A. Well, amputation was finally advised for his left leg when it became obvious that we were losing ground, and when in our opinion even if we had been able to cover his leg at that point, he would not have had a useful extremity. And our orthopedic consultant was asked to see him, and he [fol. 430] concurred in this finding and recommended the operation.

Q. And was that done?

A. Yes, sir.

Q. Was that sometime in May of 1957, Doctor?

A. Yes.

Q. Now, can you tell us approximately how much of a stump was left after that amputation?

A. He was left with a much shorter stump than we normally would do for what is called a mid-thigh amputation. There is no way to describe it accurately. But the amputation was done above the middle of his thigh.

Q. Following that did he require any further surgery in the stump area, Doctor?

A. He had considerable trouble with the stump, and we had a very difficult time getting satisfactorily healing.

Q. Was he in pain, Doctor?

A. Yes, sir.

Q. And was it severe, mild or moderate?

A. It was usually severe.

Q. Doctor, from the time of the first amputation which was in May of 1957, is it a fact that approximately a year elapsed before there was a second amputation?

A. Yes, sir.

Q. During that year, Doctor, were you in attendance on him?

A. Yes, sir.

[fol. 431] Q. Was he your patient?

A. Yes, sir.

Q. What was his condition during the year between the amputations, Doctor?

A. He continued to have exactly the same difficulty on the right leg, which gradually progressed.

Q. Doctor, I am going to hand you some photographs that were taken at the Cleveland Clinic, and ask you to look at them, and ask you if they correctly represent the appearance of some of those ulcers that Mr. Gallick had during the time that he was a patient at the Cleveland Clinic?

A. They do except for this last photograph which shows donor sites of skin.

Q. That is the photograph, Plaintiff's Exhibit No. 5, is it not?

A. Yes. It shows areas which have scarred from which skin has been taken.

Q. How about the other four photographs?

A. The others are photographs of the legs.

Q. Now, Doctor, I will ask you whether at any time during this stay his condition for the ulcerous condition appeared worse than they do in these pictures?

A. Yes, sir.

Q. Doctor, will you tell us whether or not you have any knowledge of Mr. Gallick having become addicted to narcotics?

[fol. 432] A. I can say only that we had a very difficult time at any period in his course of cutting down his narcotics or of getting adequate effect from the narcotics we used.

Q. I will ask you, Doctor, if during the time that he was under your care whether this ulcerous condition gave off any odor?

A. Yes.

Q. What type, can you describe them to some extent?

A. Well, I can describe them only as foul, the type of odor associated with gangrenous material, dead material.

Q. Doctor, have you seen him lately?

A. No, I have not, sir.

Q. Doctor, can you tell me whether or not he required blood transfusions during the time that he was under your care?

A. Yes, he did.

Q. Do you know how many or approximately how many blood transfusions he had?

A. Somewhere in the neighborhood of 30 to 40.

Q. Can you tell us about how much blood he was given at each transfusion?

A. Usually a single pint.

Q. And that 30 to 40 pints, was that administered over the course of the period of two years?

A. Yes, sir.

Mr. Dudnik: Your Honor, at this time I am going to ask [fol. 433] a hypothetical question, and I want to know what your Honor's wishes are about continuing?

The Court: May I see counsel?

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

The Court: Ladies and gentlemen of the jury, on the adjournment of court by the bailiff we will adjourn for the evening, and we will return at 9:15 tomorrow morning, once more with the admonition that you do not talk about this case with anyone, not even amongst yourselves.

Mr. Dudnik: May I ask, your Honor, for one thing?

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

The Court: I would just like to make it known to the jury so we don't keep them in the dark.

The doctor is going to be busy the early part of the morning, and for that reason we will start the proceedings tomorrow morning at 10:30 rather than at 9:15.

[fol. 434] I hope you all have a nice night's sleep.

(Thereupon an adjournment was taken to 10:30 o'clock, a.m., Wednesday, June 17, 1959, at which time the following proceedings were had:)

[fol. 435] Wednesday morning session,
10:30 a.m., June 17, 1959

DR. ROBIN ANDERSON resumed the witness stand and was further examined and testified as follows:

Direct examination of Dr. Robin Anderson, resumed

By Mr. Dudnik:

Q. Dr. Anderson, at the expense of boring everybody, I am going to ask you a hypothetical question which will be based on the facts in evidence, wherein I am going to ask you to assume certain things as being the facts for your question.

Doctor, I want you to assume that James Gallick, a man who in August of 1954 was 53 years of age, and had no prior diseases with the exception of chicken pox early in life. That the only other mishaps he had were three or four minor accidents before August of 1954; that he never had a skin disease, skin eruption, allergy, or any other illness of any kind.

That prior to 1954 while eating during an argument he swallowed something which caused him pain in his chest and he called on a doctor who saw him I think once and perhaps twice, from which he recovered.

Assume further that this man went to work for the B & O Railroad in 1944 as a brakeman and switchman; that all his life he had done hard manual work, the longest job before [fol. 436] that having been with the Hunkin-Conkey Construction Company in construction work.

That from 1950 to 1954 he worked very steadily on one job for the B & O Railroad, known as the Downtown No. 2 job, which consisted of switching cars in the flats of Cleveland; that in that area there was a bridge known as the Columbus Road bridge which extended in an easterly and westerly direction, under which ran a single track of two rails which extended north and south.

That for many years before August 10th of 1954 there existed underneath the bridge a swamp, which constantly contained stagnant water, in which were lying rats, dead

rats, dead pigeons, sometimes or most of the time between 20 and 30.

That in and around those dead rats and dead pigeons there crawled and flew bugs and insects of many kinds and description.

Assume further, Doctor, that farther down that river track, or to the south, there were areas where there were other dead rats and pigeons laying around, as well as farther up the bridge toward the north.

Assume further that the greatest concentration of dead rats and dead pigeons was in that water in the ditch which ran alongside one of the rails and was directly underneath the Columbus Road bridge.

[fol. 437] Assume further, Doctor, that this was called to the attention of employees of the company on occasions, that on occasions the roadmen or the trackmen had attempted to clean that area out, but without success.

That on approximately August 10, 1954, the exact date being unknown, Jim Gallick had occasion to walk underneath the Columbus Avenue bridge from a southerly to a northerly direction; that he walked on the left side or westerly side or opposite from where the ditch was which contained these vermin which I have told you about; that between him and this ditch were these two rails of single track.

That he stopped underneath the bridge for the purpose of determining where his engine was, and therefore in doing that instead of heading north as he was walking, he then turned around and headed south.

And that he was standing there for approximately 30 to 45 seconds and he saw his engine and decided to continue to proceed walking under the bridge. He had started, turned north again, made one or two steps in a northerly direction when he felt a sting or bite behind his left thigh about four inches above the knee.

That he touched, grabbed it with his hand, an object with his hand, that he squeezed it, that he heard it and felt it pop, that he did not see it but that it was about the length of three fingers and as big around as his little [fol. 438] finger.

That after he squeezed it and it popped, he felt it roll down the back of his pant leg.

Assume further, Doctor, that that sting or bite he continued to feel it. He was conscious of pain there at all times. At 7:00 that evening—this having occurred approximately at 3:30 in the afternoon—about one-half hour he started his daily tour of duty, I mean by that this accident occurred at about 3:30 in the afternoon; about 7:00 that evening or four hours later when he had his dinner, either shortly or before that, he lowered his pants in a dressing room of some kind, could not see this area where he felt the pain and where he was bitten, took some soap and water and washed it, continued however on his tour of duty until 11:00 that night.

Doctor Anderson, assume further that at 11:00 or 11:30 when he came home that night he lowered his trousers and showed his wife the area where he felt this bite, which continued shall we say to bother him or pain him, but not too greatly.

That she described it to him as a raised area, red in appearance, and I think a pink center or a white center, that it was small, that it gave neither him nor her any concern, that he washed it that night, continued to work the next day.

[fol. 439] The next morning she saw it again and it appeared slightly larger. That it gave him or her no concern, and he continued to work for some 4, 5, 6 or 7 days, washing it and treating it himself.

That about 6 or 7 days later the area then appeared the size of a half a dollar, was raised and pink, with a head on it; that while he was taking a bath this area with the head on it broke open, and then he went to see a doctor. The doctor saw this area. He does not recall or has no record of whether he took a history of how it happened or not, gave Mr. Gallick an injection of penicillin with some ointment dressing, and told him to come back in a couple of days.

That he did come back in a couple of days when the body was again injected with penicillin, further dressing of some kind, and told to come back, which he did. That he came back

on some four or five occasions, the last occasion being, Doctor, I think September 7th of 1954. At that time the Doctor examined the area and decided it was resisting treatment; that rather than improving it was getting worse, and recommended that he be hospitalized for further studies.

Assume, Doctor, that following that recommendation Mr. Gallick did not go back to the doctor, but came to see another doctor.

[fol. 440] Assume further that on the date that the doctor saw him the first time, the second doctor, he gave him a history of an insect bite. That the doctor put him in a hospital, performed the work of surgery, treatment, cultures, skin grafts and that he was in the hospital for some 3 months the first time; that he had gone home for about 3 weeks and came back and stayed some 14 or 15 months, during which time the second doctor treated him, and that many other lesions appeared on the body.

Assume further that this condition was getting progressively worse, that the lesions in his leg were so deep that the doctor could see the tendons and muscles, some of which were torn, that he had atrophy, and that the doctor—being Dr. Ippolito—sought consultation, and all the medication and treatment that was given him did not improve his condition.

Assume further, Doctor, that shortly after his discharge from the hospital the second time, when he was no longer the patient of the second doctor, he entered the Cleveland Clinic as a patient of the Cleveland Clinic and as your patient, Dr. Anderson.

That there were many operations performed by you, that there were some 8 skin grafts, that there were several surgical procedures under anesthetic in removing the bandages because the pain was so intense; that he was in the [fol. 441] Cleveland Clinic Hospital for some two years.

Assume further, Doctor, that after these many operations which you performed, in May of 1957 one of his legs was amputated with a short stump, and approximately a year later the second leg was amputated.

Assume further, Doctor, that in July of 1958 he went directly from the Cleveland Clinic to Highland View Hos-

pital, where he has been a patient ever since, and still is a patient today.

Assume further, Doctor, that upon examination by Dr. Ippolito he found an area on his right arm which was necrotic, which looked like some of the areas of infection that he had while he was Dr. Ippolito's patient.

Assume further, Doctor, that he is in a hospital now.

Now, Doctor, assume further that it is the opinion of Dr. Ippolito that the right arm will have to be amputated.

Taking everything that I have given you, Dr. Anderson, in this hypothetical question to be a fact, based on your treatment and observation of this man, do you have an opinion based on reasonable medical certainty as to whether or not there is a direct or proximate causal relationship between the ditch containing the stagnant water, the dead rats, the dead pigeons, the insects flying around it, the bite or sting which he sustained on that day in that area, and his present condition as you have heard in this hypo- [fol. 442] thetical question; and will you answer that question yes I have an opinion, or no I have no opinion?

A. Yes; I have an opinion.

Q. Doctor, will you state your opinion?

Mr. Leasure: Objection.

The Court: Objection overruled. He may answer.

A. My opinion is that there is a direct relationship between the state of the man's health, the insect bite, and the stagnant area.

Q. Doctor, have you an opinion based on the last time that you saw him as to whether or not he required hospital care?

A. He did require hospital care.

Q. Have you an opinion based on the last time you saw him as to whether or not he required nursing care around the clock?

A. He did.

Mr. Dudnik: You may cross-examine.

Cross-Examination of Dr. Robin Anderson

By Mr. Leasure:

Q. Dr. Anderson, as I understand it, Mr. Gallick was under your care for over approximately what period of time?

A. Two years.

Q. About two years, up to July of last year, 1958, was it?

A. Approximately that.

[fol. 443] Q. Or thereabouts. Were you in over-all charge of his case at the Clinic?

A. For most of that time, yes, sir.

Q. I assume other doctors also worked on his case there at the Clinic, is that correct?

A. That's right.

Q. I take it, however, that you were familiar with all tests and procedures of that kind that were performed on Mr. Gallick's case?

A. In the course of his care, yes, sir.

Q. So that whatever findings or lack of findings were made there while he was a patient, you were acquainted with, is that correct?

A. Yes, sir.

Q. Now, let me ask you this question, Doctor:

Have you ever talked to Dr. Heller, the first doctor who ever saw Mr. Gallick?

A. No, sir.

Q. Have you ever had any medical conference with Dr. Ippolito on the case?

A. No, sir.

Q. Now, during the time—well, let me ask you this: At the time that Mr. Gallick entered the Cleveland Clinic, was there a diagnosis, an admitting diagnosis, entered on your records?

[fol. 444] A. I can't give you that answer without—

Q. Well, we have the records here, and I am not sure I follow these records particularly probably you can turn to it much quicker than I can.

A. All right, sir. The first diagnosis of consequence by a staff doctor recorded is by the Dermatology Service which is pyoderma-gangrenosa.

Q. What is the date of that?

A. July 30, 1956. Now, this is a clinical impression. This is not a diagnosis.

Q. I understand. That was the impression at that time of your doctor there as to what he was suffering from?

A. Yes, sir.

Q. Now, at the time he entered the Clinic, did I understand you to say that he gave a history?

A. A history was taken from this man, yes, sir.

Q. And in that history did he tell you that he had had an insect bite back in about August of 1954?

A. The first time I saw this man he did, sir.

Q. Well, did he give you a particular date on it or time or how did he describe as to when it had happened?

A. I saw this man more than two years after his injury.

Q. I understand. I am just wondering what your history shows on that particular point. Will you turn to it and see?

A. The initial history as taken says it started with an [fol. 445] insect bite on the left thigh two years ago.

Q. Two years ago?

A. Yes.

Q. Let's see, that was taken—

A. In July, 1956.

Q. All right. Now, the admitting impression was given as pyoderma-gangrenosa, is that correct, Doctor?

A. Yes, sir.

Q. Will you tell us the meaning of the medical term pyoderma-gangrenosa?

A. Yes, sir. It is a descriptive term and only a descriptive term.

Q. By that you mean what?

A. It describes three things. Pyo means pus. Derma means skin. And gangrenosa means necrosis.

Q. In other words, it describes the appearance of the skin condition, is that the idea?

A. Yes. It does not, however, describe what he also had, which was exposed necrotic muscle, tendon, vessel, nerve and bone.

Q. But the term pyoderma-gangrenosa does not include a description or reference to any cause?

A. No, it does not.

Q. In other words, take a diagnosis of diphtheria, I take it that describes the condition and the cause at the same [fol. 446] time?

A. A cause in the terms of the organism involved, yes.

Q. But this particular diagnosis here, or this term pyoderma-gangrenosa, is just descriptive, it does not relate to the cause?

A. As far as most of us would be concerned, there might be some divergence of opinion on it.

Q. Very well. So that the admitting impression was simply a descriptive one, is that right?

A. Yes, sir.

Q. Was any formal diagnosis entered following that?

A. By formal diagnosis, we would mean a pathological diagnosis, which would mean specifically that this formal diagnosis would be on the chart as soon as we had a pathologic section.

Q. Well, does there come a time in your record there when a formal diagnosis was entered?

A. Yes, sir.

Q. Will you tell us when that was and what it was?

A. The first operative procedure was on August 13, 1956, and the tissue diagnosis was—well, I don't find it. I can find it some time here.

Chronic ulceration, suppuration, necrosis.

At no time was the word pyoderma-gangrenosa on a pathological report, to my knowledge.

[fol. 447] Q. But is that pathological description, once again, just a descriptive term?

A. Yes, but resulting from the study of tissue sections.

Q. But still a descriptive term of the appearance?

A. Well, the appearance on microscopic examination, yes, sir.

Q. Doctor, at the time of Mr. Gallick's final release

from the hospital, which I think you told us was perhaps last July, at the time he was taken from your hospital out to Highland View, was there a diagnosis entered?

A. The same diagnosis.

Q. What was that?

A. Chronic ulceration.

Q. Chronic ulceration?

A. Yes.

Q. Once again, just a descriptive term?

A. Yes.

Q. Of the appearance of his condition, is that correct?

A. Of appearance, yes, sir, that is what our diagnoses are based on.

Q. It does not relate to the cause, the basic cause?

A. It doesn't relate to the bacterial cause or the virule cause, no.

Q. Or some other cause if another cause exists?

A. Of the immediate cause. In terms of organism, no. [fol. 448] Q. Now, all the time that he was there at the Cleveland Clinic, Doctor, did you ever determine the basic cause of Mr. Gallick's condition?

A. You mean in terms of this organism that we are talking about?

Q. Well, do you know that we are talking about an organism, or is that theoretical?

A. For the moment it is theoretical. I don't know what the immediate cause was.

Q. All right. In other words, after two years at the Cleveland Clinic the folks out there still did not determine the immediate cause of his condition?

A. We found no bacteriologic or virule, allergic, malignant, neoplasma origin for his ulcers.

Q. In other words, you found no medical explanation for his ulcers?

A. Medical, again, from the standpoint of immediate cause. We still felt that it was on the basis of an insect bite.

Q. Did you ever make any such entry in your records, Doctor, as you have just expressed there?

A. Well, I have no—I don't know what my specific notes

are, because our notes would be made primarily by our resident, our fellows, our associates and—

Q. Doctor,—

Mr. Dudnik: Please, let the doctor answer.

[fol. 449] Mr. Leasure: I thought he had finished.

Mr. Dudnik: No, he had not. He said "and."

A. And the basic history as recorded would be the history. Unless we disagreed with it, we would not write another history comparable to it.

Q. Doctor, I am not talking about a history. My question was—perhaps it would save a little time—my question was whether you ever entered any diagnosis in your record that his condition was secondary to an insect bite?

A. This is not a pathologic diagnosis, sir.

Q. Let's approach it this way.

A. I mean, that is something that is history, not verified by tissue section.

Q. In other words, it is history not verified by your medical studies?

A. No medical study would ever establish a distant origin, or something like that.

The medical study would be something which would establish the presence of an organism, of a virus of some specific cause within this individual's body at a given moment.

[fol. 450] Q. Now, you mentioned bacteria and virus. There are other things, too, are there not, such as allergy, sensitivities, systemic disease, or conditions?

A. Yes, sir. We reviewed every one of those.

Q. You just didn't find the answer any place here, did you?

A. Not in terms of what you mentioned, no, sir.

Q. So you still don't know why his ulcers didn't heal up and you don't know why new ones developed, do you?

A. This is correct.

Q. And that is after two years of study out there at your hospital?

A. Yes, sir.

Q. Now, if you will follow me, Doctor, through your

doctors' notes there, is there an entry early—I don't have the exact date of it down here—diagnosis of pyoderma-gangrenosa, but of questionable etiology?

A. I am sure, I am sure there is such a diagnosis registered, because to us etiology again, implies the immediate causative effect which is present in a patient.

Q. That is the actual producing cause of the lesions, the etiology?

A. Yes, such as bacteria or virus.

Q. Or—

A. An allergy, neoplasm.

Q. Or—

[fol. 451] A. Or a number of things which we could name.

Q. Systemic diseases, infections?

A. These are all considered what we call a differential diagnosis, which are all of the possibilities.

Q. And having made a differential diagnosis, you still have not been able to determine the—I want to get the right word, I don't want you to quarrel with me—I think you used the word immediate, the producing cause of these ulcers?

A. The immediate producing cause, yes.

Q. And their failure to heal?

A. Yes.

Q. Now, Doctor, I think I will use this blackboard over here, and I hope you will give me a little latitude on my lack of knowledge.

Can we agree that there is one group of diseases in human beings that might be called infectious diseases, by virus or bacteria?

A. Yes, sir.

Q. Another group, what would be a designation of what I have in mind are systemic conditions, like diabetes and things of that kind that are not from an infection, but—

A. Systemic.

Q. It is a disease?

A. Systemic disease.

[fol. 452] Q. Then would a third category be allergies and sensitivities, not being too technical about it?

A. You could call it systemic disease.

Q. Well, since you have used those three terms here, let me get it down here, anyway.

Now, is this a fact, Doctor, so there is no misunderstanding, that after two years of study on it at the Cleveland Clinic you have not been able to determine whether his ulcers were caused by or failed to heal by reason of some infection or because of some systemic disease or allergy, you just haven't been able to put your finger on?

A. Well, we can say one thing, and that is an ulcer is an infection. I mean, the presence of an open wound implies chronic infection.

Q. Well, let me ask you this, Doctor:

Don't we have ulcers developing, let's say, in diabetes?

A. Yes, sir, and they all become chronically infected.

Q. They become infected after they first develop in that instance, isn't that correct?

A. Well, we are talking about the chicken and the egg, so to speak.

Q. All right, it is pretty hard to tell which comes first, the chicken or the egg?

A. And the ulceration represents a whole.

[fol. 453] Q. Is this fair, then, that due to a systemic disease the skin can become weakened to the point where a sore develops, and it gets to be a pretty close question as to whether the sore develops before the bacteria gets there, or the bacteria gets there just at the time the skin is breaking down, is that about it?

A. That could be. This is a possibility which we considered in our differential diagnosis, in this type of a problem.

Q. So that when you say every ulcer is infected, you mean that there is infection in every ulcer?

A. Yes, sir. One way or another, the ulcer and infection are part and parcel.

Q. One way or another, the infection gets into an ulcer, we won't quarrel about the chicken or the egg. Okay.

Now, of course, infection is all about us, that is, bacteria?

A. Yes, sir.

Q. At all times, is that correct?

A. Yes, sir.

Q. No matter how clean you keep your hospital, there still are sources of infection out there, is that correct?

A. Yes, sir.

Q. There are sources of infection right in this court room?

A. Yes, sir.

Q. On our clothing?

[fol. 454] A. Yes, sir.

Q. On our skin?

A. Yes, sir.

Q. No matter how clean we try to keep ourselves, in our hair, under our fingernails?

A. Yes.

Q. And in the air, too, right?

A. Yes, sir.

Q. Is this a fact, that while he was at your hospital you were never able to determine the etiology in his case?

A. Yes, sir, we found no systemic disease, allergy, or the equivalent.

Q. And you didn't find any type of infection that accounted for the failure to heal of these ulcers, did you?

A. Well, we found the ulcers chronically infected, yes.

Q. At the time he got there, you say every ulcer, once it is an ulcer, becomes infected?

A. Yes.

Q. But did you find any specific infection that refused to yield to your treatment and thereby you deemed that as the specific cause of the ulcer?

A. The infections in the ulcers refused to respond to treatment. If you are talking about a generalized affair like meningitis or spinal cord involvement, and so on, no, we found no specific source of an infection in the body.

[fol. 455] Q. Did your bacteriological studies show the varying types of infection in the ulcers?

A. It showed varying organisms.

Q. All right, so one would be there, you would find that, and you take another smear, that would be gone and something else would be there?

A. Yes, sir. This is very common.

Q. Because every time you have an open sore it is going

to pick up infection through the air, through contacts, and other means?

A. Very true.

Q. So you still after all these studies are not able to tell us the immediate cause of his condition?

A. Very true.

Q. So you can't say it falls in this category, and you can't say it falls in this category, right (indicating on blackboard)?

A. I can say that we are dealing with a chronic infection, whereas I can't say that we are dealing with a systemic disease or allergy. That is as far as we can go.

Q. Well, if it is a systemic diseases or allergy, you haven't found it?

A. Yes, sir.

Q. It could be that, couldn't it?

A. It is a possibility.

[fol. 456] Q. And if his ulcers are caused by a systemic disease or allergy, they would still be infected, wouldn't they?

A. I would think so, yes.

Q. So simply the fact that you found them infected still doesn't decide which category his case falls in, is that correct?

A. No, but it determines how we investigate this man, and when we complete a series of investigations, so far as our abilities and medical knowledge permits, we rule out the various things which we consider as possibilities, namely, the systemic diseases and the allergies.

Q. You say you rule them out, you mean you didn't find anything?

A. This is what we mean by ruling out—

Q. But you can't say that there isn't something there in that category, namely, systemic disease or allergy?

A. It is always a possibility, yes.

Q. Until you find the specific and immediate cause you can't really rule out anything, can you?

A. Not a single thing.

Q. And you were not able to find a specific or immediate

cause, so we still have the possibility that his basic trouble falls in either one of those two categories up there?

A. Possibility, yes.

[fol. 457] Q. Now, will you look at your record under date of January 8, 1957?

He had been there about six months by that time. Do you have it there?

A. Yes, sir.

Q. Is this entry there, "No etiology found so far"?

A. Yes, sir.

Q. And by that time what generally—without going into great detail—what kind of tests had you conducted in an effort to locate the cause of his trouble?

A. He had already had the most important tests done on several occasions, namely, the pathologic study of the tissue which had been removed on one, two, three, four, five, six, probably seven separate occasions he had had operative procedures. Perhaps it is more. I haven't checked it carefully, on which pathologic study had been done.

Q. All right, that is studying tissue?

A. Studying tissue, which are most important, and bacteriologic studies had been carried out on entry, and bacteriologic studies were carried out at intervals on these chronic infected wounds.

Q. And then will you look for March 1, 1957? Is this entry in there, "Etiology never identified"?

A. Yes, sir. You are talking about interns' and residents' notes, not that this is significant, but as far as this intern [fol. 458] who saw him he felt from reading the record, yes, no immediate etiologic factor.

Q. What is the definition of the word etiology, Doctor?

A. Cause.

Q. Thank you.

A. But by etiology we mean immediate cause.

Q. In other words, the cause which when cleared up will heal the patient?

A. Yes. That is reasonable.

Q. Now, upon discharge on April 13, 1957, do you find this entry, "unknown etiology"?

A. Yes, sir.

Q. Who made that entry?

A. One of my residents.

Q. And then upon admission again on April 25, 1957, was this impression entered, "Ulcers of legs, unknown origin"?

The Court: What is this date?

Mr. Leasure: April 25, 1957.

A. Yes, sir.

Q. That is there. All right. Now, look at April 30, 1957, do you find this entry, "Main trouble not yet diagnosed as to etiology"?

A. Yes, sir.

Q. Then was he admitted again on June 27, 1957?

A. Yes, sir.

[fol. 459] Q. Was this entry made, "Ulcers of right leg of unknown origin present for two and a half years"?

A. Yes. It was made by my fellow.

Q. Beg pardon?

A. Made by my junior fellow.

Q. All right, working under your supervision, I assume?

A. Yes.

Q. Now, look at February 5, 1958, do you find this entry—no, February 13, I believe it is, 1958, do you find an entry covering the blood cultures at that time?

A. I do not, sir.

Q. Well, were your blood cultures sterile in this case?

A. Were they sterile?

Q. Yes.

A. Usually not, sir.

Q. Well, I have a note here, February 13, 1958, of a blood culture being sterile.

A. Oh, I am sorry, blood cultures, as far as I know, yes, sir, excuse me, were sterile. I thought you were referring to—

Q. You didn't identify any infection in the blood?

A. No, not that I know. Now, this does not mean that it can't be there. This is just—it just means that on the particular occasions when blood was drawn, they did not grow out organism in the usual manner, putting them on

[fol. 460] plates, and so on. It does not mean that there were not organisms there.

Q. Of course, we know anything is possible. But on the occasions when you took blood cultures, you didn't find anything?

A. No, there was no blood stream material, what we call septicemia, blood stream infection.

Q. Now, will you look under date of June 12, 1958, Doctor, do you find this entry, and I am not sure I can read the writing, "Chronically ill man who has a disease of unknown cause"? I believe—"who has a primary disease of unknown cause."

A. On what date, sir? June 12th?

Q. Wait until I look for it again. June 12, 1958. Do you find an entry of June 12th?

A. Yes. There are about 10 entries here and I just missed it, obviously.

Q. All right, will you take a moment?

A. All right, go ahead. "Chronically ill man who has a primary disease of unknown cause," yes, sir.

Q. Who made that entry?

A. I hate to say. I can't read his name. It is not mine.

The Court: It isn't yours?

A. Not mine or out of my service. This is someone who [fol. 461] was asked to see him for a specific set of symptoms typified as a peculiar state of response to pain, and so forth, and so forth.

Q. Doctor, I take it—

A. This is an expert that we called in for this purpose.

Q. That brings me to this question:

I take it that although you are a plastic surgeon and he was under your general care, that you did from time to time call in experts in other fields when you wanted the benefit of their knowledge and opinions on this case?

A. Almost constantly, sir.

Q. Trying to find out what the trouble was?

A. Yes, sir.

Q. Doctor, in view of the hypothetical question that was asked you, I want to ask you a few questions about that.

By the way, when it was stated to you this morning by Mr. Dudnik, is that the first time you had heard it or seen it?

A. So far as that specific document, yes.

Q. Had Mr. Dudnik talked over that subject with you previously at all?

A. We had discussed Mr. Gallick, yes, sir.

Q. No. Have you discussed a hypothetical question of that general nature?

[fol. 462] A. I don't think we talked about it as a hypothetical question, because we had discussed it in terms—

Q. Is it fair to say that before he asked you the question, he knew what your answer was going to be?

Mr. Dudnik: Your Honor, that is an unfair statement.

The Court: The objection is sustained.

Q. Well, have you discussed that general subject with Mr. Dudnik, as far as him reading the question to you?

A. Yes.

Q. Now, Doctor, and I want you to give us a complete answer to this question, if you will, please:

Will you tell us exactly how in response to the hypothetical question you arrived at the conclusion that you expressed?

A. My reasoning on this has to start with the patient as I saw him and treated him; and on the history which so far as the hypothetical question is concerned, is presented to me as established facts.

This man had massive ulcerative disease which from a medical standpoint, and as far as medical evidence is concerned, can be traced back directly to something related to a bite from some insect which was observed and found to be a small red mark.

[fol. 463] Over a specific period of time this small red mark increased in size.

At the end of six to seven days this red mark had increased to something much larger, with what we are told had a head on it.

And we must assume that this lesion at this time is the same lesion which started at the time of the original injury.

From this point on there is steady progress, all of which is verified medically.

From this point we have our own history in terms of the record. We must carry our basic reasoning back one step further, and that is that the presence of filth, of rats, of dead vermin, of stagnant water, predisposes to disease, predisposes to the growth of insects and the like.

This man was bitten in close proximity to such an area of stagnant filth, and it is only logical and we must assume that the probability is there that whatever it was in the insect, in the bug, is related to the presence of that area.

Q. Doctor, is that your complete answer?

A. Yes.

Q. Doctor, do you have any specialized knowledge of the habits of insects?

A. No, I do not, sir.

[fol. 464] Q. Except for whatever might have been stated in the hypothetical question, Doctor, can you say, first, whether Mr. Gallick was ever bitten by an insect?

A. This information is given to me in the hypothetical question.

Q. And except for that you have no knowledge on the subject?

A. This is strictly on the basis of the hypothetical question.

Q. Except for the hypothetical question I take it you have no knowledge, then, as to where an insect, if any, came from prior to the time that it bit Mr. Gallick?

A. My reasoning is on the basis of the question.

Q. Except for the hypothetical question you would have no knowledge or opinion as to how long the insect, if there was an insect up his pants leg, had been there prior to the time that it is said to have bit him?

A. That is presented to me, sir.

Q. So that except for the hypothetical question, you have no knowledge as to what, if any, effect the presence of rats or pigeons or water would have upon any insect in the area, is that correct?

A. Not quite correct, sir. Since we know, and in my own

opinion the presence of such an area would predispose to both insects and disease.

[fol. 465] Q. Doctor, let's assume that the area involved here is bounded by the Cuyahoga River on two sides—I am using Plaintiff's Exhibit No.—

Mr. Dudnik: I don't know whether we marked it as an exhibit.

Mr. Leasure: Shall we mark it now?

Mr. Dudnik: Yes, absolutely.

Q. Can you see that, Doctor?

A. Yes, sir.

Q. Let's assume that this is the Cuyahoga River here, and again up here, and that it bends around down there.

Let's assume that this insect bite is alleged to have taken place under this bridge here, inside the red circle.

Let's assume that the distance from the bridge to the river on the down side of the picture is perhaps two to three hundred feet, and up the other side is a proportionate distance of several hundred more feet.

Doctor, wouldn't you be interested in knowing also what the sewage conditions were in the Cuyahoga River which is close by there, in addition to the other facts you were given?

A. In terms of probability?

Q. In terms of what, if any, effect it might have on insect life and health conditions in the area.

A. I am sure that any number of factors may contribute [fol. 466] to this thing.

Q. Right. Well, let's assume that raw sewage for many years had been dumped into the Cuyahoga River, both upstream here so that it comes down past here, or is dumped over in here, so that the Cuyahoga River at all times involved here had raw sewage in it, that could involve into this picture, too, could it not?

A. It is a possibility, sir.

Mr. Dudnik: Did you say possibility?

A. Possibility.

Q. In other words, that affects the general health conditions in the area, does it not?

A. Yes. Many things for distances of many miles, I am sure, can affect health conditions.

Q. Do you have any specialized knowledge, Doctor, of the flight habits of insects, how far they move and how fast they move?

A. I do not, sir.

Q. With the exception of the knowledge that I think all of us laymen have from our own personal experience, do you have any knowledge of what—any specialized knowledge—of what attracts particular insects?

A. I don't quite understand your question, sir.

Q. Well, can we agree that since you don't have specialized knowledge of insect life, that you wouldn't have [fol. 467] specialized knowledge of what attracts insects, what they feed on and where they are likely to be?

A. You mean why a mosquito bites a human being?

Q. No. What conditions, let's say, attracts particular types of insects? I am talking about specialized knowledge, now, as distinguished from what we all observe and learn from our everyday lives.

A. I can say in terms of medical specialized knowledge, a medical, a doctor is expected to understand principles of sanitation, and as such we know that the presence of stagnant water is traditionally a breeder of water insects, and we know that the presence of rats implies the presence—or of various insects that feed on it, such as the plague-carrying insect which is a rat flea which lives on the rat both living and dead, and it is the cause of the famous plague episodes in history.

We know a certain number of facts which are specialized perhaps in the medical sense but not specialized for an entomologist or an insect expert.

Q. So that there are certain recognized diseases which can be traced to particular insects?

A. There are a certain number, yes.

Q. You haven't found any such disease in the case of Mr. Gallick, have you?

[fol. 468] A. No, sir.

Q. Doctor, do you know of any medical reason why ulcers developed in other parts of Mr. Gallick's body where there was no history of insect bite?

A. We have no proof.
Q. You can't say!
A. We have no facts such as—
Q. All right.

Mr. Dudnik: Just a minute, please, sir. Finish your answer.

Mr. Leasure: I think he finished his answer.

Mr. Dudnik: "Such as," you left him in the air.

The Court: He may finish his answer.

Q. Go ahead.

A. Such as the specific causative agent, primary causitive agent which was mentioned before.

Q. I am asking you, Doctor, whether you can tell us why other ulcers developed. If you can, I would like to have you tell us; if you can't, I would like to know that.

A. Not specifically, no, sir.

Mr. Leasure: Do we have the Highland View Hospital [fol. 469] record here?

Mr. Dudnik: Yes. We got it yesterday afternoon.

Mr. Leasure: Did you enter that?

Mr. Dudnik: May we?

Mr. Leasure: Yes, please do.

OFFER IN EVIDENCE

Mr. Dudnik: Somewhat as an interruption, by agreement, we offer the Highland View Hospital records, Plaintiff's Exhibit No. 18.

(Plaintiff's Exhibit 18 was marked for identification.)

Mr. Dudnik: We offer that in evidence, and these, your Honor, are photostats of the originals. The originals are staying at the hospital.

The Court: They will be accepted.

Mr. Leasure: If I may have just a moment, your Honor, I am trying to locate something here.

By Mr. Leasure:

Q. Well, it is in there someplace. Will you tell us this, Doctor, since this has been admitted into evidence, and this will be subject to location later, I simply want to find out what the medical meaning of this entry is.

First, do you know a Dr. Binkley here in town, a dermatologist?

[fol. 470]

A. No, sir.

Q. Will, without reference to that, will you tell me what this entry means medically?

Mr. Dudnik: Mr. Leasure, are you quoting from a record?

Mr. Leasure: Yes, I am.

Mr. Dudnik: From which hospital record?

Mr. Leasure: The Highland View Hospital record.

Mr. Dudnik: That is all right. You will show it to me later?

Mr. Leasure: Yes.

Mr. Dudnik: Fine.

Q. "Infection"—and this, of course, is in the case of Mr. Gallick—"Infection is not etiologic. The tissue (allergic) reaction is basic."

What does that mean medically, Doctor?

A. That means very little to me, sir. Will you read it again, please?

Q. "Infection is not etiologic. The tissue (allergic) reaction is basic."

A. I don't think I understand what is implied.

Q. Well, when the statement is made medically that in-

[fol. 471]

fection is not etiologic, does that mean that infection is not the cause?

A. To use the word etiologic to modify the noun infection is something that I would not use myself.

An infection can be an etiologic agent. In other words, if you get an abscess up in your brain you may have an infected toe, and that is the etiologic agent for the brain abscess. And the etiologic abscess for the infected toe may be an organism like staphylococcae. But the word etiology just means cause, and infection means state of chronic in-

flammation or acute inflammation, such as we have discussed.

Q. Well, would it be better English to use etiological instead of etiology?

A. No. Etiologic is all right except that it isn't an adjective that I would use in that context. I don't know what is implied by that statement that infection is not etiologic. That means nothing to me.

Q. Well, what does this last part of it mean, if anything, to you medically, "The tissue (allergic) reaction is basic"? That doesn't mean anything to you?

A. It doesn't mean a thing, sir. It may mean something in context. But out of context it has no meaning at all.

Q. Actually, in the case of Mr. Gallick, Doctor, during all the time he was in your hospital you were trying to find [fol. 472] out what, if any, infection he had, is that correct?

A. If he had a specific infection which was—

Q. The causative agent?

A. —the single cause of ulceration.

Q. You didn't find any such infection?

A. No such single etiological agent.

Q. You found an infected ulcer?

A. Yes, sir.

Q. But you didn't find a single infectious agent?

A. A single organism that we could attack, no, sir.

Q. You didn't find any infectious cause of his various ulcers?

A. No, not in terms of a single one.

Q. Or a double one?

A. All right, or a double one, yes, sir.

Q. Okay. You were also looking for systemic diseases or allergies which might account for the formation of his ulcers and their resistance to heal?

A. Yes, sir.

Q. You never found anything in that field?

A. No, sir.

Q. In other words, you just didn't find anything?

A. Not in terms of a specific etiologic agent, no, sir.

Q. In terms of a specific cause?

A. Direct cause, yes.

[fol. 473] Mr. Leasure: That is all.

Redirect examination of Dr. Robin Anderson.

By Mr. Dudnik:

Q. Doctor, will you refer to your notes on August 1, 1956?

First, Doctor, on page 2 of the admission, the history, do you have the history on page 2? Will you read the history? What is the date of that history?

A. July 27, 1956.

Q. Would you read that history?

A. (Reading): "This 55-year old white male has had for two years two large open wounds on the dorsal side of both thighs and two smaller ones on the dorsal side of the left ankle, and in the crux. Muscles, tendons, and so forth, are free hanging in the open space and green viscous pus is all over it."

Should I continue?

Q. Is there anything further? Yes.

A. (Reading): "It started with an insect bite on the left thigh two years ago. When this made deeper infiltration, Dr. Ippolito of Garfield Heights did a skin graft from the right thigh on the left, and a process started then on the right leg, also, too, and started spreading.

"Scars are visible in the left axilla, the armpit, and over the right chest and on the right knee."

[fol. 474] Should I continue?

Q. Doctor, will you turn to August 1, 1956? When the case came to you, Dr. Anderson, is there a note in regard to that from the Dermatology Department?

A. "Transferred to Dr. Anderson. This is a surgical problem."

Q. That is what it says?

A. Yes.

Q. Doctor, do you have a note on February 18, 1957? Will you turn to that entry?

Mr. Leasure: What was that date, again?

Mr. Dudnik: February 18, 1957.

Q. Is there a note there relating to non-systemic origin?

A. This is a note by Dr. Battle.

Q. Who is Dr. Battle?

A. The head of the Hematology Department.

Q. What does he say?

A. "The review of the history and previous studies including two special counts"—these are special laboratory red blood cell, white blood cell counts, and smears, done by the hematologists instead of the general laboratory—"including two special counts and a physical exam do not suggest a systemic disease to me."

[fol. 475] Q. Now, Doctor, will you turn to February 26th of '57, where it talks about diabetes.

A. This is from the diabetic service.

"Patient regarded as non-diabetic and not to receive diet instruction unless proven otherwise."

Q. Doctor, do you have a note on February 5, 1958, relating to whether it is or it is not a systemic disease?

A. A note of Dr. VanOrdstrand.

Q. Who is Dr. VanOrdstrand?

A. Dr. VanOrdstrand is one of the medical men and head of the medical chest diseases. "Concur with above." This is a note which says essentially no systemic disease. "Concur with above.

"I am at a loss to explain a systemic basis for this patient's problem."

Q. Now, Doctor, was there a time when you saw the tissues and muscles eaten away, until the bone was exposed?

A. Yes, sir.

Q. What areas, Doctor?

A. Well, both of the thigh areas and the knee area on the right side showed this through almost the entire course that he was in our institution.

Q. And the bone was exposed?

A. Yes, sir.

[fol. 476] Q. Doctor, what is the meaning—how many doctors, approximately how many doctors saw him at the Clinic?

A. Well, I am sure that at least 15 or 20 staff doctors saw him, and at least a hundred or more residents and fellows.

Q. Doctor, what is the meaning of the initials RO, or the meaning of the words "Rule Out" in a hospital?

A. Well, any time we are attempting to make a diagnosis without something that we consider reasonably incontrovertible proof, such as tissue diagnosis from the pathologist, or something which the bacteriological service would give us as a specific organism, in other words, something that we can accept as close to fact as possible, we have to go through a mental process of setting up for ourselves a list of the likely possibilities, and some which are not likely possibilities, and until we come up with a specific diagnosis, something which tells us what the problem is in our opinion, and give us something that we can approach medically, surgically, or whatever the method, then we must systematically try to rule out, try to eliminate one after the other of the various possibilities, until we make a diagnosis either by hitting one with a specific test, or by reaching a diagnosis by exclusion.

In other words—

Q. I take it—I am sorry.

[fol. 477] A. The end point would be the same. We try to reach a definite diagnosis and eliminate or rule out the various possibilities we have set up in our own particular list.

Q. In other words, you eliminate the possibilities and you try to deal in probabilities, is that the answer?

A. Yes, sir.

Q. So that when you told Mr. Leasure that it is possible that he had all of those diseases which you ruled out, what is the probability as to whether he had those diseases?

A. Very, very small. In fact, extremely small.

Q. Then you had ruled out all of the diseases that you mentioned which I am not going to repeat?

A. Yes.

Q. Including systemic diseases?

A. Yes.

Q. And allergy?

A. Yes.

Q. Now, Doctor, I believe you told Mr. Leasure in answer to a question that anything is possible?

A. Yes.

Q. In medicine do you deal with possibilities or probabilities?

Withdraw that question, and put it this way: Are you looking for what is probable or possible in medicine?

[fol. 478] A. If we are going to treat we must have probabilities.

Q. Now, when you were shown this picture of the area, I believe you said that it was possible that that insect could have come from the river or from 500 yards away, did you not?

A. Yes, sir.

Q. Knowing all the facts that you do, both from history, from treatment, and from what you have been told by me as a fact, what is the probability, not the possibility, but the probability as to where that insect came from?

A. The closest location is the probable location.

Mr. Leasure: Just a moment. I want to object as being outside the doctor's field of knowledge. Of course, that involves, I think, a specialized knowledge of insects, their habits, and so forth, which he admitted he does not have.

Mr. Dudnik: He also stated an answer to the hypothetical question. This is just redirect.

Mr. Leasure: That is one of my objections to the hypothetical question. It goes entirely outside his field.

The Court: The objection is overruled. The doctor may answer.

Q. Had you finished your answer?

[fol. 479] A. The probable location is the closest site which in this instance would be stagnant, swampy water.

Mr. Dudnik: I think that is all.

Recross examination of Dr. Robin Anderson.

By Mr. Leasure:

Q. Well, in view of those questions, Doctor, this will take a little more time.

Do you know of any insect that is a half-inch in diameter and two inches long that is known to attack man?

A. Not specifically, sir, no.

Q. I take it, then, you have no ideas as to what the habits of such an insect, if it exists, might be?

A. No, sir, I do not.

Q. Doctor, you were asked about ruling out systemic diseases, and as I understand it, you undertook a course of testing in which you endeavored to locate certain known systemic diseases, if they exist in Mr. Gallick?

A. Yes, sir.

Q. You didn't find any known systemic conditions or diseases in his case, is that correct?

A. Neither I nor the consultants.

Q. You also attempted to locate a primary and specific infection in his body?

A. Yes, sir.

[fol. 480] Q. You didn't find that either, did you?

A. Not in terms of the agent which we have discussed.

Q. So you ruled out specific and primary infections, too, did you not, along with systemic diseases?

A. So far as we know, we do not have a specific etiologic agent.

Q. So, in fact, you just ruled out everything that you know about which leaves them what, Doctor?

A. A very ghastly sick man.

Q. Yes, from some—

A. Who received a bite and who developed something which followed a bite.

Q. But you don't know it is?

A. I know that it is very desperate ulceration which still progresses.

Q. You don't know the primary or specific cause of it?

A. Not the organism, no, sir.

Q. And if you found that tomorrow or next week or next year, you could well find that it has absolutely nothing to do with an insect bite, isn't that correct?

A. No, sir. On the basis of the history the insect bite is the only single thing which in our knowledge could have caused this.

Q. Now, Doctor, an insect can cause a sickness or a condition in a human being only in one of two ways, am I correct, [fol. 481] either by injecting a poison or toxin of some kind, or injecting some bacteria or virus?

A. Injection is not necessary. The irritation, the foreign body of a sting, all of these things can produce an inflammatory response. In other words, when you are bitten by—well, if you were struck by a thorn which does not inject anything, you still get an inflammatory response and you may get a severe infection type reaction to it, with ulceration.

Q. I was trying to cover both things, Doctor, and perhaps I didn't make my question clear.

So that whether it is an insect or a thorn or whatever might break your skin, it may introduce an infection?

A. It could be anything. We just have in the hypothetical case it was an insect.

Q. All right, that is still hypothetical, as far as you as a doctor know?

A. That is what is presented to me, yes.

Q. That is right, so you have to take it as presented?

A. Yes, sir.

Q. The only other way an insect can cause a person trouble is through injecting a poison of some kind at the time of the bite or sting?

A. I don't know whether I can agree with you or not, [fol. 482] sir. There may be other ways. I don't know.

Q. Can you name any other ways, that is what I want to find out?

A. No. I am not a qualified expert on that subject.

Q. In all your studies, Doctor, you have found no toxin or poison which would come from an insect which would account for this man's problem, is that correct?

A. Not in the period that we were involved. I would not expect to, no matter what it would have been originally.

Q. Did you look at the Marymount Hospital records?

A. No, sir.

Q. You have never found any specific or primary infectious agent that you can say is the cause of this man's trouble?

A. Not a single etiologic agent, no, sir.

Q. So that if it is due to an infection, and if you should at some time find out what the agent is, the specific infectious agent, it could well be, could it not, Doctor, that it might be the kind of infectious agent that is not involved with insects?

A. Sir, it could be anything under the sun, but the probability here is that if it started with an insect bite, which we must assume, that everything that has gone after the original lesion, the original ulcer, is related to it. This is something which medically we can't ignore and we can't eliminate.

[fol. 483] Q. So that whatever you have said here, whatever opinion you have expressed as to causation, is based entirely either upon the hypothetical question, or what Mr. Gallick had to say at the time he entered the hospital?

A. Yes, sir.

Q. And not from findings made by you at the hospital yourself?

A. I saw no insect, sir.

Mr. Leasure: That doesn't answer the question.

Will you read the question?

(Last two questions and answers read by the reporter.)

Mr. Leasure: I want a direct answer to the question, your Honor. Obviously it is not responsive.

The Court: The answer is not responsive, Doctor.

Q. Do you want the question read again?

A. Yes, I am sorry, sir. Would you read it to me?

(Question read by the reporter.)

A. So far as causation, prior to this patient's being in the Cleveland Clinic, the answer is, yes, it is based on the hypothetical question and on the history as given by the patient, plus the history as given to us from the previous [fol. 484] hospitalization.

Q. The only facts appearing—wait a minute. I think you told us you hadn't seen the Marymount Hospital record. To what were you referring?

A. I have not, sir. The patient was admitted on the Dermatology Service and was referred to the Cleveland Clinic Dermatology Service from Marymount Hospital.

I received this patient in transfer from our own Dermatology Service. So I was not in communication with Marymount Hospital.

Mr. Leasure: Will you read the last part of his previous answer? I want to find out what is meant by it.

(The following was read by the reporter: "Plus the history as given to us from the previous hospitalization.")

Q. I don't understand what you mean by that.

A. Well, when the patient was transferred from the hospital, the previous service I know in this instance was in communication with the service handling him in the previous hospital.

Q. So that can we say that your hospital would have called Marymount and asked them what their history showed?

A. Somebody would have. I can't give you a specific answer.

[fol. 485] Q. So you were still referring to nothing more than what Mr. Gallick had related at the time he entered Marymount Hospital?

A. Yes, yes.

Q. Now, Doctor, just a couple of more questions.

If Mr. Gallick had come to Marymount Hospital and given a history there, had come to your hospital and given a history, and instead of saying that his trouble had started with an insect bite, he had said that his trouble had started with a splinter that he had run in his leg here at the same place, you would be here this morning, would you not, testifying entirely truthful and in your opinion based upon the history that you obtained that his troubles started with a splinter?

A. If we could have had as good a chronologic history with the same medical here, which is documented, one would have to assume yes, it started with a specific thing, be it a splinter or something else.

Q. Or a pimple that he said he scratched, or anything else?

A. If we had it documented, this has to be a possibility, but that is not the case here, sir.

Q. I am talking about the patient coming to you, assuming Mr. Gallick had come to you instead of giving history of an insect bite at this location here on his left leg, he said, [fol. 486] "I ran a splinter into it"?

A. I would have to believe, I would have to believe the history of the patient.

Q. All right, and then you would say that his trouble started with a splinter?

A. If this were the history that were given, I would be forced to believe it, yes, sir.

Q. All other medical facts being exactly the same as they are here, if the history was given of a splinter instead of an insect bite, your opinion then would be that his trouble was caused by a splinter?

A. I think that is reasonable.

Q. And if Mr. Gallick had come to you and given a history of having been bitten by an insect at home, and not at work—

A. Sir—

Q. —you would have to take that?

A. —any of these things are possibilities. It could have been any injury we could conceive of.

Q. So that your opinion, Doctor,—I just want to ask one last question—so that your opinion here as to causation, whatever opinion you have expressed, is based, in so far as an insect bite is concerned is based entirely on Mr. Gallick's history, the one that he gave when he entered the hospital?

A. That and the hypothetical case.

[fol. 486a] Q. That and the hypothetical case presented by Mr. Dudnik?

A. Yes, sir.

Mr. Leasure: That is all.

Mr. Dudnik: Thank you, Doctor, I have no questions.

The Court: May I see counsel?

(Thereupon Court and counsel conferred at the bench outside the hearing of the jury.)

The Court: Let the record show that the plaintiff has filed as of June 16, 1959, his reply instanter, and that there is no objection on the part of defense counsel to the filing of said reply.

Is that right, Mr. Leasure?

Mr. Leasure: That is correct.

The Court: Ladies and gentlemen of the jury, we will now recess for the luncheon period, once more with the

admonition that you do not talk to anyone about this case, not even among yourselves, and you will return at 1:45.

(Thereupon an adjournment was taken to 1:45 p.m., Wednesday, June 17, 1959, at which time the following proceedings were had:)

[fol. 487] Wednesday afternoon session,
1:45 p.m., June 17, 1959

OFFERS IN EVIDENCE

Mr. Dudnik: At this time, your Honor, I wish to offer into evidence Plaintiff's Exhibit No. 19 which is the aerial photo.

(Plaintiff's Exhibit 19 was marked for identification by the reporter.)

Mr. Leasure: For the record, may we have the date when that was taken?

Mr. Dudnik: I would say a few days before the trial commenced. So it would be around between June 1st and the 5th.

Mr. Leasure: We have no objection.

The Court: Without objection it will be received.

Mr. Dudnik: At this time, your Honor, I offer into evidence Plaintiff's Exhibit No. 20, which is the Marymount Hospital bill in the amount of $11,846.45.

Mr. Leasure: May I see that?

Mr. Dudnik: I gave you a copy of it yesterday.

Mr. Leasure: I didn't see it.

The Court: Any objection?

Mr. Leasure: No objection.

[fol. 488] The Court: Without objection it will be received.

(Plaintiff's Exhibits 20, 21, and 22 were marked for identification by the reporter.)

Mr. Dudnik: I offer into evidence Plaintiff's Exhibit No. 22—you have a copy of that.

Mr. Leasure: No objection.

Mr. Dudnik: May I withdraw that, your Honor? I withdraw that for a moment.

I offer into evidence next Plaintiff's Exhibit 21, which is the bill against Mr. Gallick of the Cleveland Clinic Foundation. It is stipulated between counsel that the amount, although they would have to be added up, the total is $21,816.67.

The Court: Any objection?

Mr. Leasure: No objection.

The Court: Without objection it will be received.

Mr. Dudnik: And the bill of Highland View Hospital—

The Court: Is this Plaintiff's Exhibit 22 now?

Mr. Dudnik: Plaintiff's Exhibit No. 22, your Honor, in the amount of—up to May 31, 1958, in the amount of $6,000—

[fol. 489] Mr. Nurenberg: Mr. Dudnik, May 31, 1959.

Mr. Dudnik: I am sorry. May 31, 1959, in the amount of $6,174.

Mr. Leasure: No objection.

The Court: Without objection it will be received.

Plaintiff Rests

Mr. Dudnik: At this time, your Honor, the plaintiff James Gallick rests his case.

* * * * *

[fol. 495] The Court: Gentlemen, before I act on the motion that the Defendant presented yesterday, I think Mr. Leasure said you may have some further information you may want to present to the Court.

Mr. Leasure: Yes, your Honor. There is one case we wanted to check particularly to see what was involved as well as perhaps other things.

Mr. Hadden checked on that, so he will make the statement.

(Thereupon further argument was had with respect to the motions.)

Court's Ruling on Motion to Strike Each of the Specifications of Negligence

The Court: Counsel for Defendant has made two motions. The first motion was one to strike each of the

specifications of negligence. The second motion was one for a directed verdict.

The Court having now arrived at a decision on these motions will make its rulings.

First, as to the motion to strike the specifications of negligence. Specification of negligence number five was stricken by agreement of counsel. The Court therefore will pass to the remaining specifications.

[fol. 496] The Court feels specification of negligence number one is also set out in specification number six, and therefore is redundant. The motion to strike specification of negligence number one is granted, and the Court therefore orders specification of negligence number one stricken from the amended petition.

The motion to strike specification of negligence number two is granted, and the Court therefore orders specification of negligence number two stricken from the amended petition for the following reasons:

A. It requires a specific affirmative act on the part of the Defendant and does not state negligence on his part.

And B, because the experts' testimony in this case definitely established that draining alone was not a proper solution to the area complained of.

The motion to strike specification of negligence number three is granted, and the Court therefore orders specification of negligence number three stricken from the amended petition, for the reason that there was no testimony that chemicals would eliminate the condition complained of, and for the further reason that the law does not require the Defendant Railroad to take a particular affirmative course of action, rather, under the law it is merely re-

[fol. 497] quired to provide a safe place for its employees to work, and further it is not permitted to be negligent in its dealings with its employees either by a negligent act or omission.

The remaining specifications of negligence set out in the petition are well stated, and therefore the motions to strike specifications of negligence number four and number six are overruled.

Having disposed of the motions to strike the specifications of negligence, and since two specifications of negli-

gence remain, the Court will now rule on the motion for a directed verdict.

During the course of the trial and after this motion was made, the Court examined all of the cases cited by both the Defendant's and the Plaintiff's attorneys.

ORDER OVERRULING MOTION FOR A DIRECTED VERDICT

The Court does not now intend to discuss the applicability of these various cases to the motion before it. Rather, it will simply state that based on the fact that this case is brought under and controlled by the provisions of the Federal Employers Liability Act, and since the Court is bound by the cases previously decided thereunder, said motion is overruled.

* * * * * * *

[fol. 498]

Defendant's Case

Mr. Leasure: Mr. Delaria, will you please step forward, please?

Thereupon the Defendant, to maintain the issues on his part to be maintained, called as a witness PAUL DELARIA, who, being first duly sworn, was examined and testified as follows:

Direct examination of Paul Delaria.

By Mr. Leasure:

Q. Will you state your name, please?

A. My name is Paul Delaria.

Q. Mr. Delaria, I want you to keep your voice up so that [fol. 499] we all can hear you. Where do you live, Mr. Delaria?

A. I live at 1205 Notre Dame Avenue, Cleveland 4, Ohio.

Q. Have you ever appeared as a witness in a court room before?

A. No, sir.

Q. Well, just try to relax as best you can, and I think things will go along all right.

By whom are you employed?

A. By who what?

Q. By whom are you employed?

A. By the Baltimore and Ohio Railroad.

Q. How long have you worked for them?

A. 46 years.

Q. In what capacity?

A. Foreman.

Q. A particular type of foreman?

A. I got in as an extra garage foreman. Then regular track foreman, section foreman, and then I was for promotion a couple of times, but I want to stay in Cleveland so I am still foreman.

Q. So you have been a section foreman for the B & O?

A. Yes, sir.

Q. Now, back during the time of 1954 did you have a particular section of track or part of the right-of-way of [fol. 500] the Baltimore and Ohio under your jurisdiction?

A. Yes.

Q. As section foreman?

A. Yes, here in Cleveland, yes.

Q. Is that the way the situation worked at that time, that each section foreman had a particular part of the right-of-way or track to care for?

A. Yes, sir.

Q. Did you have people working under you?

A. Yes, sir.

Q. That is, a section gang?

A. Yes, section gang.

Q. Or group of employees working under you, all right. Now, will you tell us, Mr. Delaria, what section of track you had under your control back in 1954, that is, where it started and where it stopped?

A. Well, my section run at that time from where the Yellow Cab is now.

Q. Go ahead.

A. All the way through the flats and what we call Whiskey Island. That is near the lake.

Q. All right. To state it a little differently, did it extend from the west end of Clark Avenue yard up to Whiskey Island?

A. Not at that time, no. From the distillery we call it, [fol. 501] the old distillery plant.

Q. Where is that with reference to Clark Avenue yard, that is what I am trying to find out.

A. That is just east of Eagle Ramp, Eagle Avenue, the bridge.

Q. How far east is that from Columbus Road Bridge?

A. It would be approximately nearly a mile east.

Q. About a mile. All right. Your section started about a mile east of Columbus Road bridge?

A. That is almost center point of the section.

Q. Then it extended up past Columbus Road bridge to Whiskey Island?

A. Yes.

Q. And how far is Whiskey Island from Columbus Road bridge to the west?

A. It is a little better than a mile.

Q. So you had about two miles of track under your supervision?

A. Yes.

Q. Now, when did you first start caring for that section of track, Mr. Delaria?

A. February 1, 1920, '21, 1921.

Q. And you continued to care for that section of track up until what time?

A. Up to around, I don't remember the exact year, but it would have been in 1932, '33. I was out on the road for [fol. 502] about eight years, with my headquarters South Park six years, two years at Brooksville. Then after eight years I came right back here and worked approximately the beginning of the war.

Q. About 1941 or '42?

A. Yes, sir.

Q. You started back on the same section of track as track foreman?

A. Yes.

Q. Then you continued to care for that same section up to what time?

A. I am still there.

Q. Mr. Delaria, this case involves an incident that allegedly happened under Columbus Road bridge. So I want to turn our attention now to that particular part.

Well, let me use, if I may, Plaintiff's Exhibit 4.

Will you take a look at that, Mr. Delaria.

A. That's it.

Q. Is that Columbus Road bridge?

A. Yes, sir.

Q. Is this track that is shown going under the bridge known as the River Track?

A. Yes, sir.

Q. And is that part of the track that is under your [fol. 503] supervision and control as track foreman?

A. Yes, sir.

Q. And it was back in 1954 as well as other years?

A. Yes, sir.

Q. Now, I call your attention to an area to the right-hand side of the tracks there under the bridge. Can you see this where there appears to be some water standing right in here?

A. Yes, a little.

Q. I just wanted to point it out because I want to refer to it in a question.

Now, was there a time when there were two tracks going under this bridge?

A. Yes, sir.

Q. Up to what date or year approximately did that continue?

A. 19—either at the end of '51 or 1952.

Q. And then what was done?

A. Well, I re-arranged the present track.

Mr. Dudnik: Did the witness say "I re-arranged the present track"?

A. I re-arranged it. I was in charge of it. Under my superior's instructions there.

Q. Well, did you take one of the tracks out?

A. I took one track out and re-arranged the other.

[fol. 504] Q. Re-arranged the track. The track that you took out had run to the right or the left of the track—

A. Towards the right or west side.

Q. So the track you took out had run on the right-hand side of this picture?

A. Yes.

Q. Now, Mr. Delaria, before the second track was taken out—well, let me ask you this first, preparatory. Let me draw a little picture here, that would be the best thing I think.

This I intend to be Columbus Road bridge here and the railroad track here. Now, before you took the second track out, was the drainage in this area here along the track approximately the same as it was afterward?

A. It wasn't changed.

Q. It was not changed. So the drainage system was the same?

A. Yes, sir.

Q. What is the drainage in—let's use railroad directions—this would be what?

A. East.

Q. East?

A. And this would be west.

Q. Although geographic directions measure a little different. Now, was the general flow of water in this direc- [fol. 505] tion, toward the east?

A. Yes, sir.

Q. At that time was there also a ditch leading from the area under the Columbus Road bridge to the east up to a drain tile?

A. Yes, sir.

Q. The drain tile started approximately there, just as it does now? You have to answer so he can get your answer on the record.

A. Repeat that?

Q. Instead of just nodding your head.

A. I see, I am sorry.

Q. Now, at the time the two tracks were there was there any problem about clearance of cars under this bridge, the Columbus Road bridge?

A. Yes.

Q. Will you tell us about that, please?

A. I could have printed it myself if you wanted to, the situation.

Q. Beg pardon?

A. I could make a little sketch.

Q. Well, maybe I can help you here. Let's draw a bridge here, this is the bottom of the bridge. May we have that as the track?

A. Do you want me to come down?

[fol. 506] Q. Well, no. Does this make sense to you? Maybe we can use this picture here. Well, just answer my questions and I think we can do it by words rather than getting involved in a matter of diagrams.

Was there a problem about clearance under the bridge?

A. Yes.

Q. What do you mean by that?

A. Well, the one we took out was a little lower than the present one. There used to be a crossover there. Every time we had a high car we just line the crossover, switch them around. Whenever I had this high car, let them go that way.

Then our problem was we had to lower this in order to get the high car through there.

So we dug down, I dug down enough depth so I would be allowed to put some fresh stuff underneath, like slag, to get it out of the mud. Then approximately five or six inches raised. Then we cleaned everything out and we made a path from the track so the people could walk, you know, the brakemen at night.

But we had to have that lower so we drain, couldn't go any higher on that drainage. That's the problem, the height of the car.

Q. I think that explains that. Now, the second track, [fol. 507] the one that you took out, was that called a passing track?

A. Passing track?

Q. And this was called the river track?

A. The river track.

Q. So you took the passing track out and the river track remained?

A. Yes.

Q. Are you telling us then that you lowered the river track a little bit?

A. Yes.

Q. So that it would be comparable to what the passing track had been?

A. Yes, sir.

Q. So you could get clearance on your cars?

A. Yes, sir.

Q. Now, both before and after you took this second track out, did some water attempt to accumulate and stand at about this area here?

A. A little bit, yes.

Q. A little bit. In other words, was it something similar to what is shown in this picture, Plaintiff's Exhibit 4?

A. There haven't been any change.

Mr. Dudnik: I beg pardon. I didn't hear.

Mr. Leasure: "There hasn't been any change."

[fol. 508] Q. Now, it has been suggested here, Mr. Delaria, that all you have to do in order to avoid this water standing is to put some slag over here in this area that is marked with these little curlicue things here, so as to bring the level of the ground up, so the water coming up here will pass right along the ditch and into the drain tile.

Now, have you yourself given consideration to putting slag or some other material in there to lift the level of that ground?

A. The only solution of that is, if you take the bridge out or raise the bridge, which it is the City or County, whatever it is. But if we do that you make—

Q. If you do what now?

A. If you are filling with slag.

Q. All right, go ahead.

A. You make a regular swamp in there, then it won't be safe for the train, because your track would be pumping, and you have a low spot, you have a derailment, and it would be a worse place for the trainmen.

Q. Now, let me ask you this: Let's take this area right here as the area where the water tends to accumulate.

Suppose you fill in this with slag, the water coming from up here, where would the water go then if you raised this level here?

[fol. 509] A. Well, usually back in toward the track. Your track would be so soft that it make unsafe to operate on.

Q. It would come down here under your track?

A. Yes. Probably part of it goes out, but part of it does more damage than anything else.

Q. Now, by going under your track, you mean the water would get under the ties?

A. Yes.

Q. When water stands under the ties, what happens when trains go by?

A. The track gets pumpy, what we call pumpy. It pumped mud.

Q. Pumping ties?

A. Yes, pumping track.

Q. In other words, when the train goes by it tends to go down, pump, and then come up?

A. Yes.

Q. And it throws out the mud and you have a loose track?

A. Yes. Main thing is the drainage.

Mr. Dudnik: Main thing is the drainage?

A. For railroad, for railroad.

Q. In other words, Mr. Delaria, you have to keep the water away from under your track?

A. Yes.

[fol. 510] Q. Now, as it stands down there, do I understand that the water accumulates here instead of accumulating under your track?

Mr. Dudnik: If your Honor please, I have been permitting Mr. Leasure to lead his witness. I am going to insist that he ask the questions rather than lead him, and I object.

Mr. Leasure: This is a summarizing question.

Mr. Dudnik: And I object.

The Court: I recognize that perhaps some of these questions may be leading. I would suggest to Mr. Leasure to keep away from the leading questions as much as possible, but I do recognize that the witness is trying to describe the area there. Proceed.

Mr. Leasure: May I have the question and answer read?

(Last question was read by the reporter.)

Mr. Leasure: Let me revise that.

Q. Do I understand then as the situation now stands the water accumulates alongside the track instead of under the track?

Mr. Dudnik: Objection.

The Court: Objection sustained.

[fol. 511] Q. As the situation now stands, Mr. Delaria, where does the water tend to accumulate, under your track or off the track?

A. Off the track.

Q. Alongside the track?

A. Near, toward the wall.

Q. As shown by this diagram here?

A. Yes.

Q. Now, if you raise the area where the water now accumulates, where would it accumulate then and stand?

A. All over, all over. In the track, in the path.

Q. All right, in the track and in the path.

A. Part of it goes out but it makes worse.

Q. Now, have you given any consideration to raising your track and road bed there?

A. Can't.

Q. You say you can't?

A. Don't got no clearance.

Q. You mean you don't have any clearance?

A. Between the track and bridge.

Q. Who owns that bridge?

Mr. Dudnik: Objection.

The Court: He may answer if he knows.

A. I don't know. It is not B & O property. It must be [fol. 512] either the City or the County. I imagine the City.

Q. Does it carry a public road?

A. Yes.

Q. Where automobiles travel?

A. Yes. It is not a railroad bridge.

Q. It is not a B & O bridge, all right. Was that bridge there, that same bridge there when you first took over the section of track?

A. Yes, yes.

Q. And that was back when?

A. February 1, 1921.

Q. So it was there before that. Now, have you given consideration, Mr. Delaria, to lowering this underground tile that goes up to the east this way to a manhole that is up in here somewhere?

A. I tried, but our drainage pipe I think is about approximately an inch or two higher than the drain pipe, the other, the one that takes the water. So if I lower we get the water back this other way.

Q. I will use this same diagram that I drew when Mr. Neff, an engineer called by the Plaintiff, was on the stand, and ask you to assume that this tile here is the one that leads away from this area under the bridge, that is, from the ditch which extends out there, and goes down, and this represents the manhole, and this represents the lead-off [fol. 513] pipe from the manhole down in this direction.

Now, is this what you are referring to, that is, these two pipes here?

A. That one into the other one.

Q. This one into that one?

A. The other one there.

Q. Well, this one comes from that direction?

A. Well, then it is that.

Q. Then it is this one?

A. Yes.

Q. Is that what you were just telling us about?

A. Yes.

Q. That there is just an inch or so there?

A. About an inch or so, between an inch or so higher than the other one.

Q. So if you drop this one down to here, let's say, then what would happen?

A. What would happen, the pipe gets plugged.

Q. You mean it backs up?

A. All the stuff stays in. It has no way to drain.

Q. Now, Mr. Delaria, how often would you say on the average that you or members of your crew are up in this area of the Columbus Road bridge in the course of your duties?

A. Well, pretty often. There isn't a week that we don't [fol. 514] do something about it, clean it up, brush it up a little.

Q. How often do you and your men come along this part of the track?

A. About every week.

Q. Every week or so?

A. Sometimes, the way it used to be in them days, I was there pretty near every day at that time.

Q. Well, I probably didn't clarify my question very much. Was there a change in this system some months ago?

A. Yes, they did.

Q. Within the past year or so?

A. May 1st.

Q. May 1st of 1959?

A. Yes.

Q. All right, let's take before that, then. Up to May 1, 1959, which would include the years '53, '54, and other years around there, about how often would you or your men be up in this area in the course of your work?

A. About every other day at least.

Q. About every other day?

A. Yes.

Q. Now, from your knowledge, Mr. Delaria, what can you tell us as to whether or not things tend to be thrown off this bridge which come down there on to your right-of-way?

A. I don't understand you.

[fol. 515] Q. Well, do people passing along the bridge sometimes throw things off and come down?

A. All along the bridge they do that.

Q. What kind of material is that?

A. Well, rubbish usually. Things like that. And as soon as we see that stuff, all them bridges they throw stuff out, we clean it up as we go along.

Q. In other words, there are more public bridges than this one right there in that area?

A. (Witness nods.)

Q. You still have to answer.

A. Yes, sir, below, east, out east they got about four, around four other bridges there.

Q. And papers, boxes and things like that come off?

A. Yes, they do that, they get rid of it.

Q. Now, when you or your men are up in the area, what if anything do you do about foreign material that has accumulated in through there, as well as other places along there?

A. Well, if it is paper, burn them up. If it is rubbish, if it is garbage, pardon my language, we usually bury it.

Mr. Dudnik: Bury it?

A. Bury it. Dig a little hole and bury it.

Q. If you find any dead animals or anything of that kind along there, what do you do with that?

A. We do the same thing, dig a hole and cover them up. [fol. 516] We don't have to dig the ditch. Dig it away from there.

Q. In other words, if you—

A. Take it away to a dry spot.

Q. From time to time do you do anything with this ditch that leads from this place under the bridge down to the drain tile?

A. What does that mean?

Q. Well, do you care for that in any way, the ditch?

A. Yes.

Q. What if anything do you do for that in the course of your work?

A. We clean it up.

Q. What do you mean by that?

A. If the stuff gets in the ditch—I don't get the—

Q. How do you maintain the ditch?

A. By cleaning it. Maybe some stuff got a little high spot, we lower that.

Q. By digging it out you mean?

A. Yes, digging it out.

Q. And what do you do in order to keep that drain tile open, so that water flows through, that is the drain tile that connects with the end of the ditch here and goes to the manhole?

A. Nothing to do there on the pipe unless it gets plugged. If it does get plugged, we run some, something to open it [fol. 517] up, something like that.

Q. A snake-like affair?

A. Sir?

Q. A snake-like affair, is that what you mean?

A. Yes.

Q. What if the opening is broken by debris of some kind, do you clean that out, too?

A. Yes.

Q. In other words, you service this area there as well as the rest of your track?

A. (Witness nods.)

Q. Now, it has been testified to here, Mr. Delaria, that Mr. Gallick, that is, Mr. Gallick says that he upon I believe one or two occasions, perhaps two occasions back sometime in 1954—I don't exactly know when, I don't think he knew for sure—let's assume sometime between the first of 1954 and August of 1954 he made complaints to you personally about dead rats and dead pigeons being along the track and beside the track in this area. Do you recall any such complaint from him?

A. No, sir.

Q. If such a complaint had been made do you believe that you would recall it?

A. Yes, I would.

Q. Have any of the men, any of the employees of the [fol. 518] Baltimore and Ohio, since you have been track foreman made any complaint to you about dead rats or dead pigeons or anything of that kind along the tracks or down in that area?

A. No, sir.

Q. Now, this particular place—we will get another picture here, I think this aerial photo will show—if I may use another of your exhibits, Mr. Dudnik. This is Exhibit 19.

Now, Paul, I don't know how well you can see that, but this red circle has in the center the Columbus Road bridge. Do you think you can pick that bridge out? This is an aerial view looking down, of course.

A. Where is Carter Bridge from there, so I get the location?

Q. Do you see the Carter Road Bridge here?

A. Yes, Carter—

The Court: Mr. Delaria, will you keep your voice up because the jurors on the other side have to hear you.

Q. Now, do you see your tracks coming up under the bridge and on up here to the Cuyahoga River?

A. Yes.

Q. Now, I am going to point to a building here which is right at the end of Carter Road Bridge. Do you see this building here?

A. That is the old depot.

Q. That is the old B & O depot building?

[fol. 519] A. Yes.

Q. Back on 1953 and '54, as well as other years around there, were there certain offices in that building?

A. Yes, there are yet.

Q. There are yet, what offices are there?

A. Well, they got Baltimore and Ohio downstairs. The Police Department upstairs. We got the operator, Medical Department. Then I think they rent the third floor.

Q. Then do you see this large building up here, it is in kind of a bow shape, can you tell us what that is, do you recognize that? I know this is hard.

A. Is the freight house, B & O freight house?

Q. Well, I think it is, yes. Does it look like it to you?

A. Yes.

Q. Now, going down here, coming back to Columbus Road bridge, do you see what appears to be a street or road going down here?

A. Lime Street.

Q. Is that Lime Street?

A. Yes.

Q. Is that a public street?

A. Yes.

Q. Now, let's follow that, if we may. Does that come off the end of Columbus Road bridge or down the ramp there?

A. Yes, yes.

[fol. 520] Q. Going down here under Carter Road bridge and on down does Lime Road continue on this way?

A. No, no—yes, yes.

Q. Where does it go?

A. Over there, that bridge. Then it gets on a little city bridge. It don't go all the way out, and turns into Canal Road.

Q. Does this Lime Street or Lime Road, whichever it is, lead down to Mau-Sherwood plant?

A. Mau-Sherwood and Sherwin-Williams.

Q. That is this one here?

A. Yes.

Q. And Sherwin-Williams is this one on down here?

A. Yes, and then it gets on the bridge.

Q. Do you see cars parked over here in this area?

A. Yes.

Q. Do those cars get down there by coming down Lime Road?

A. Yes.

Q. Now, do you see a lot of cars parked here, which is across the tracks here from Mau-Sherwood, do you see these?

A. Yes, yes.

Q. Can you tell us whose parking lot that is?

A. Sherwin-Williams.

Q. And is this their plant down here?

A. Both sides of the tracks.

[fol. 521] Q. Both sides, here and here?

A. Yes.

Q. Very well. Now, during the time that you have been section foreman have you received any complaints or notices or anything like that from any city officials or county officials or state officials concerning any alleged unsanitary conditions down there along your tracks?

A. No, sir, no, sir.

Q. When people use Lime Road here, does Lime Road show in this photograph, Exhibit 4?

A. That is Lime Road, yes.

Q. Is this Lime Road that I am running my finger along?

A. Yes.

Q. So about how close then does Lime Road, this public road, come to the area under Columbus Road bridge?

A. It is very close.

Q. About how many feet, can you give us an estimate?

A. Roughly it would be about 20 feet.

Q. Then does your track as it goes east here and Lime Road parallel each other for a distance?

A. Yes.

Q. And how close are they to each other when they are running parallel?

A. Well, you see, it is a narrow street there. Sometimes they drive right on the track.

[fol. 522] Q. Well, is it within a few feet of your tracks?

A. Right on top of it, some of these truck drivers—

Q. About 10 or 15 feet or so? I want to get some estimate here in the record.

A. You mean away from the track?

Q. Yes, how much distance between Lime Road and your track?

A. Well, in a distance of a hundred some feet you will have say about 10 feet distance. Then you get closer and you are right to the track.

Q. All right. For about a hundred feet, then, it is within 10 feet?

A. Maybe a little more than a hundred feet, something like that.

Q. And then east of that it gets still closer?

A. Yes, on account of the street is so narrow.

Mr. Leasure: You may cross-examine.

Cross examination of Paul Delaria.

By Mr. Dudnik:

Q. Mr. Delaria, you are still working for the railroad?

A. Yes, I do.

Q. When did you last see this—

A. When did I last what?

Q. When did you last see this area in Plaintiff's Exhibit 4, when did you last see it, sir?

A. Well, I saw that the other day.

[fol. 523] Q. When the other day?

A. A couple of days ago.

Q. A couple of days ago? Today is Thursday. Did you see it Monday?

A. Tuesday I think it was.

Q. The day before yesterday. When was the last time you saw it before that?

A. I was over one day about a week previous to that. But I can't recall the day.

Q. Well, is it fair to say then that you saw it two days ago, and about ten days ago?

A. That's right. No—yes, that's right, yes.

Q. Who was with you when you saw it two days ago?

A. The trackmen.

Q. Were you on the job then?

A. Yes.

Q. And who was with you when you saw it ten days ago?

A. Who was with me? A motor car, pushcar, and about three men. Went to west side, drove back and forth.

Q. Who were the men?

A. Well, the regular men I got.

Q. The men that work with you?

A. Yes.

Q. How did it look when you saw it two days ago?

A. Not very good.

[fol. 524] Q. What?

A. Not very good.

Q. Not very good?

A. No, sir.

Q. Slimy? Slimy?

A. Well, I don't know what you call slimy, what you mean, dirty?

Q. Did you see the green filth in the ditch going from the bridge down to the drain tile?

A. Yes.

Mr. Leasure: I think I will object to these descriptive adjectives such as debris and filth unless it is stated what he is really talking about.

Mr. Dudnik: If he doesn't know what I am talking about, he could ask me, your Honor.

Mr. Leasure: That may mean one thing to someone, and something else to another.

Mr. Dudnik: That is still a matter of redirect, your Honor.

Mr. Leasure: I object to the fact that he doesn't describe.

The Court: He may answer if he knows. If he doesn't know—

A. Can I explain—

[fol. 525] Q. No, I want to hear your answer, and then I will let you explain.

Mr. Leasure: I am still objecting, your Honor.

The Court: I will overrule the objection.

Mr. Leasure: All right, thank you.

Mr. Dudnik: Read me the question and the answer.

(Question and answer read by the reporter.)

Q. Now, you saw that the day before yesterday?

A. Yes.

Q. And you saw it ten days ago?

A. Yes.

Q. Did you see the water under the bridge?

A. I saw a little, yes.

Q. A little. Now, I believe that you said when you were shown this picture, this picture here, Exhibit No. 4, that there is a little water there.

The Court: Mr. Delaria, you can't nod your head because the reporter has to hear you.

A. Yes, yes.

Q. A little water there?

A. Yes.

Q. Now, I am going to show you another picture, and ask [fol. 526] you if from the second picture I show you it appears that there is more water than in the first picture? I am showing you Plaintiff's Exhibit No. 2. Now, will you take a look at that. Is there more water there from the appearance of the picture than there is in the first picture you were shown?

A. Well, I see spots here.

Q. Will you stand over here, then, Mr. Delaria, and we will all see it together.

(Witness steps down.)

Q. Will you point out to me and to the jury where are the spots of water that you see, where are the spots you are talking about?

A. Right through here. That is where it gets plugged up.

Q. What is here, sir?

A. You know why it got in that condition?

Q. No. I just asked you the question. The question was—

A. Why is it?

Q. No, not why. What is this, sir?

Mr. Leasure: Just a moment. The picture speaks for itself. There is no showing that this man was there when it was taken, that he has any more knowledge of this than is shown in the picture. I think it is an unfair method of cross-examination, and improper.

[fol. 527] Mr. Dudnik: He used the picture to illustrate.

Mr. Leasure: He didn't use this picture.

Mr. Dudnik: You used it.

Mr. Leasure: I used this one here.

The Court: It is an exhibit. It is part of the evidence. If the witness is familiar with the picture, he may testify what he sees on that picture.

Mr. Leasure: The point is, your Honor, he is not any more familiar with that picture than anyone in the court room. It speaks for itself, whatever it shows, on the date that it was taken.

The Court: What was the last question?

(Last question read by the reporter.)

Mr. Dudnik: The question is what does he see in that picture?

The Court: He may answer.

Q. The question I am asking, what is this, Mr. Delaria?

A. I never saw that condition.

Q. Mr. Delaria, that isn't my question.

Mr. Leasure: We will stipulate it is water, if that is [fol. 528] what you want.

Mr. Dudnik: Just a moment, sir. I am cross-examining a witness.

The Court: The court has ruled that this picture is in evidence, and that the question is a proper question. The witness may answer it to the best of his ability.

Q. Mr. Delaria—

Mr. Leasure: Just state what it is, that's all.

A. I don't know what it is. I never saw a place like that. I can't answer that.

Q. In other words, you now say you don't know what that is, is that your answer, Mr. Delaria?

A. Yes, in that shape what it is.

Q. No, no. Do you know what this picture shows? What is this?

Mr. Leasure: We will stipulate it is water.

Mr. Dudrik: No, I don't want you to stipulate, Mr. Leasure. Just a moment.

The Court: Let the witness answer.

A. It is a white spot to me, your Honor.

The Court: What is that?

A. It looks to me like a wet spot.

[fol. 529] The Court: It looks to him like a wet spot.

Q. White or wet?

A. White and wet, that's what it looks like. That's what the picture shows.

Q. Do you see water here?

A. I don't see no water. I see the picture. I see paper. I see white.

Q. You don't see any water there?

A. No.

Q. All right. You were looking at Plaintiff's Exhibit No. 2, were you not, sir?

(Witness resumed witness stand.)

A. What is that?

Q. Well, never mind. That is Plaintiff's Exhibit 2.

Mr. Delaria, do you remember that manhole, now, again, Plaintiff's Exhibit 4, along here, it doesn't show on this picture, there is a square manhole?

A. I know what you are talking about, yes, I do.

Q. That is under your work, jurisdiction, isn't it?

A. Yes.

Q. That is the B & O manhole, isn't it?

A. Yes.

Q. That's the one you work with, isn't it?

A. Yes.

[fol. 530] Q. And if it is plugged up it is your job to unplug it, isn't it?

A. Yes.

Q. Now, we will go back, Mr. Delaria, to this picture, and would you be kind enough to trace for me the entire area that you have to cover when you are working? Did you understand the question? If you can I would like you to trace the entire area that you have to cover on any day that you work, and if you will stand sideways, the jury will be in a position to see what you are doing, sir.

A. Where is Main Street here?

Q. What is your territory on your duty that you have to cover in a day?

A. I have no specification what I have to cover. I am the foreman. I go wherever I think it is necessary to go, unless we got something in particular that I got orders to go. Otherwise, it is my funeral.

Q. What I mean is this, you don't go to Berea, do you?

A. I don't go, no.

Q. You have a certain limit of territory that you cover as foreman?

A. But this here don't cover it.

Q. In other words, you still have more?

A. Oh, yes.

Q. How many miles do you have of railroad to cover?

[fol. 531] A. Well, before we had from—where the taxi cab is, at that particular time, up to cross Whiskey Island, and Pennsylvania, New York Central, right near the lake there, at that time.

Q. That was in '54?

A. Now different, now I got more.

Q. Now, going back to '54, in August, how many square miles, do you know what I am talking about, of territory

did you have to cover on your job, not that you went every day, but how much did you have to cover in your tour of duty?

Mr. Leasure: I think I will object to this. Just a moment, Mr. Delaria. He is asking for square miles. There has been no testimony that it is subject to square miles. On direct examination we have developed I think that we had about two miles of track. The square mile feature I think is improper in this instance, unfair.

The Court: He can describe as best he can the area that he had control and charge of.

A. It is not square, your Honor. It is long.

Q. How long?

The Court: Can you show?

A. Around a couple of miles. It was at that time. Now different. We got different setup, all the railroad has.

[fol. 532] Q. How many bridges did you have to go under and look under in connection with your work on your territory?

A. Under?

Q. Yes.

A. Well, comes first Carnegie Bridge.

Q. Where is the Carnegie Bridge?

A. On top of the B & O track.

Q. That is—

A. That is Carnegie, Carnegie goes to West Side.

Q. To Lorain Street, it connects up with Lorain Street?

A. Yes. Then we have Eagle Ramp, and then this one. But we got a lot of other bridges that go over—

Q. How many altogether, Mr. Delaria?

A. I don't know that. I would have to figure it out.

Q. Well, let me ask you. I don't want you to figure. I want an estimate. Thirty, twenty, forty?

A. No, not that many. I don't believe there is that many here in the city.

Q. How many would you say?

A. Well, Carnegie, Eagle Ramp, Columbus Road, and then we got Bridge 463, that is through Marvin Avenue.

That is not an overhead bridge. That is a new bridge that was built.

Then we have Main Street, that is way up. Then we have Bridge 464. That's all.

Q. How many men were in your crew to do this work [fol. 533] in '54 besides yourself?

A. You don't have no exact amount. It is not always the same. The railroad send me, you are allowed three men, so much time this month, and next month maybe they have a little more money to spend, well, I will have five. It all depends how much money they got to spend. All the railroads operate that way.

Q. It all depends how much money the railroad has, depending on how many men they use to keep the place clean?

A. That's right.

Q. Now, sir, there was just one crew on a shift, is that right?

A. Yes, that is plenty for that time.

Q. You are sure of that?

A. Oh, yes.

Q. Now, I don't mean to be fresh with you, Mr. Delaria, but you never had any engineering experience?

A. No, sir. But I don't hold no back seat on engineering stuff if it is railroad, another thing.

Q. But I mean you never studied engineering?

A. No.

Q. Did you when you removed the double track and made it a single track underneath Columbus Road Bridge, did you do that all on your own idea?

A. No.

[fol. 534] Q. How was that done?

A. We had engineers. I have supervisor, that is foreman of all foreman. And we have division engineer, and he has got a staff, you know, assistant. So we always plan our work.

Q. Did you then do this according to some scale or some drawings?

A. Yes. At that time we had this and the freight house together, combined.

Q. Then when you took this double track and made a

single track out of it, it was done according to engineering specifications?

A. Yes, it was.

Q. Then it wasn't done your own way? You were told how to do it?

A. I was told, and they want my idea, that's the way we work. They want my idea on what to plan, what you think about it.

Q. Did you—

Mr. Leasure: Let him answer.

Mr. Dudnik: I will, I am sorry.

A. If I have a suggestion they will take it, and, of course, if it is no good, they just scrap it, and say no, this is the right way. But a lot of times the man on the ground he gives good advice.

Q. And, Mr. Delaria, you found that when you took the [fol. 535] other track out, it left an area under the bridge like this, did it not?

A. No, sir.

Q. Well, let's forget about the water that is in there. Did it leave an area which was lower than the ground along here?

A. You want my answer on that just the way we did it?

Q. No, we will come to that. My question is after you concluded your work, when was that, in 1951 or '52?

A. Something like that, right along there.

Q. You then found that after it was all done and you had one track, two rails, you had an area in here which I am pointing to—do you follow me?—which was lower than the area alongside of it?

A. I didn't get the track, didn't get that far. It was closer to this one and we moved it this way.

Q. You mean the track was originally closer to this thing?

A. Closer.

Q. Now, my question is when you are all finished, here you are, this is all finished—right?

A. Yes.

Q. —when it is all finished, no matter how the track was

before, when it was all done you have here an area, a place which was lower than here, is that right?

A. It is lower? Well, yes—

[fol. 536] Q. That is my question.

A. But we didn't leave that condition there that way.

Q. No, you wouldn't leave that condition that way, that is a bad condition there, isn't it?

Mr. Leasure: I object to that, your Honor, the characteristics. The exhibit speaks for itself.

The Court: The witness said, "We didn't leave that condition there like that," and I think Mr. Dudnik—

A. What we did, we lowered all the mud, all the stuff, we had bulldozer there, we had quite a bit of equipment, we load that stuff, we unload slag, we even dug under this track and put slag all over, put slag right alongside, all fresh stuff. Now—it is not now.

Q. Now it is down?

A. I hope it would go down a little more, the tracks, we get a little more clearance. Get a little more clearance.

Q. And a few more rats?

Mr. Leasure: Just a minute. Let's be fair, Mr. Dudnik.

The Court: That question will go out.

Q. Is it down now, Mr. Delaria?

Mr. Leasure: I object to that.

[fol. 537] A. The same grade.

Mr. Leasure: Unless he says what he means by down.

Mr. Dudnik: He knows what I mean. It is his words, your Honor.

The Court: Mr. Dudnik pointed to the area with his glasses there, the spot. Do you understand the question, Mr. Delaria?

A. Yes.

Q. Is it down now today?

A. It isn't down, because you have to have that grade. It isn't down. You can't go down.

Q. No, my question is this—

A. It is the same grade, got to keep the same grade.

Mr. Leasure: He answered the question and now Mr. Dudnik says no, no. I am objecting to that.

Mr. Dudnik: I won't say no. All right.

Q. Mr. Delaria, what I want to know, when you saw the place the day before yesterday, was the ground which I am circling with my hand lower than the ground which I am circling with my hand to the right of it?

A. The way we usually have it, it is not lower or higher, the way we usually have it.

[fol. 538] Mr. Dudnik: I ask that the way we usually have it be stricken, your Honor.

The Court: Mr. Delaria, you can answer that yes or no.

A. Your Honor, I can't answer because I didn't dig it down there. It would be lower if somebody dug it out, but if nobody touch it, it wouldn't have been lower. It could be higher, if you ask me, but it wouldn't be lower because nobody dug it out. How can it get lower? Unless it gets away from the bottom I can understand. That's why I can't answer yes or no. It is lower, I can't answer lower, because nobody dug it out.

Q. Now, if you don't understand my question, I will ask it in another way, Mr. Delaria.

A. Yes.

Q. You were there the day before yesterday, is that right?

A. Yes.

Q. Did it then look like it does on this picture?

A. No.

Q. But you saw it the day before yesterday, did you not? Did you see some water in here the day before yesterday?

A. Toward the wall, yes.

Q. Did you see it in this area where I am pointing?

A. I didn't see any water there.

Q. Now, will you then come down, please, and show the [fol. 539] jury with your hand, outline where the water was when you saw it the day before yesterday?

A. It was in this direction wet.

Q. All right, now, how was it—

Mr. Leasure: Let him answer.

A. A couple of inches water here, and there was a little spot here. But I don't see all this mess here on this picture.

Q. How was it ten days ago?

A. Ten days ago it was better.

Q. Better than that yet?

A. Yes.

Q. So that ten days ago there wasn't even a little bit of water there?

A. There was a little bit of water, but not—

Q. But less than you described a moment ago?

A. Yes, two days ago, yes.

Q. Was that drain—the big manhole thing, we call it a drain, the one with the cover on?

A. Yes.

Q. Was that plugged ten days ago?

A. No, sir.

Q. Was it plugged two days ago?

A. No, sir. It is not plugged yet.

Q. And it hasn't been?

A. I hope it isn't.

[fol. 540] Q. Has it been plugged in the last two months?

A. To tell you the truth, it didn't need much attention on that plug as much as it did on that, because there is not much stuff goes in there. Once in a while I raise it, and I don't see any use cleaning.

Q. Is it fair to say that for the last two months it needed no cleaning, is that a fair statement?

A. Not in the manhole, but it needed a little cleaning once in a while on the ditch.

Q. On this ditch?

A. Yes, sir, once in a while you got—

Q. I am sorry. In the last two months that manhole needed, none of these pipes, those three pipes which Mr. Leasure drew for you, needed cleaning, they were not plugged?

A. Yes, and now today somebody has gone over maybe look the things over, see if there is anything, find anything, but I am pretty sure in that manhole there is nothing to get out.

Q. And hasn't been for two months?

A. No, sir.

Q. All those pipes leading from the manhole, are they B & O pipes?

Mr. Leasure: What was the question? I didn't hear it. You have your back to me.

Mr. Dudnik: Are all those pipes leading from the man-[fol. 541] hole B & O pipes.

A. I don't know.

Q. You don't know?

A. No.

Q. How about the drain tile, has that been cleaned the last couple days when you were there two days ago?

A. We take care of them every time we have a heavy rain.

Q. I am talking about the drain tile which goes from here down.

A. Yes.

Q. Has that been cleaned?

A. No. When you clean them, you either have to take them out or—

Q. Did you have to clean them in the last two months?

A. No, sir.

Q. It has been in good shape the last two months?

A. Well, fairly good shape. I wouldn't say very excellent.

Q. Well, was it plugged up?

A. No. It would be a half-inch, it could be a thing like that, but not plug up.

Mr. Dudnik: I didn't hear the answer, could be what?

A. Could be a half-inch of stuff runs in there, or a thing like that, because, you know how ditches are.

Q. But not plugged up?

[fol. 542] A. Not plugged up.

Q. And no water, you would have no trouble getting the water through?

A. We had trouble, we always had a little trouble getting water through.

Q. Why was that, Mr. Delaria, that you had trouble?

A. Well, because of the condition of that bridge. Nothing I can do. I can't raise the bridge. I can't lower the

track, and the way I figure get the water through the other way, and the engineer told me if you do that you will have rest this way—

Mr. Leasure: You are not permitted to say what somebody else told you, Mr. Delaria.

Q. Mr. Delaria, do I understand, then, that you know of no engineering methods by which you could cut out or eliminate the accumulation of water in this area where I have run my hand, is that right?

A. I didn't get that, engineering what?

Q. Well, you know of no way that any engineer can make a plan—I am going to try and make it easy for you to understand me—can make a plan or do something to raise this area, so that it would run, the water would run, all the water would run into the drain tile? Did you understand my question?

A. Yes, I understand your question. I don't have engineer [fol. 543] experience, but I am well aware of anything to be done on the railroad. I don't believe an engineer got anything over—

Q. Over on you?

A. That's right, if it is for track work. Now, if I got to do something else, I am lost.

Q. But on this stuff you don't take a back seat for any engineer?

A. The engineer, they come over there, they study the situation, they see things. I see engineer over there several times, B & O, look around. Well, that's the best position the way it can be done.

Q. Then I take it I made a fair statement to you, you know what I am saying when I am saying I make a fair statement, that there is no way that you know, and you feel you wouldn't take a back seat for any engineer on this proposition, so that there is no way that you know or any engineer would know, how to eliminate the water from this area completely, is that right?

A. Under the circumstances.

Q. Under the circumstances?

A. Yes.

Q. Mr. Delaria, the drain tile doesn't show on this pic-

ture, Exhibit 2, does it, the drain tile, that is farther this way, isn't it?

A. That way.

[fol. 544] Q. In this area where you saw whatever you said you saw, lower than the drain tile?

A. I would say it is about level.

Q. About level?

A. About level.

Q. Do you know Mr. Clason? He is a switchman?

A. Maybe I know his face. I don't know the name.

Q. I was going to ask you if Mr. Clason ever complained to you about this condition, but as long as you said nobody complained to you, so Mr. Clason couldn't have done it either, could he?

A. Who is Mr. Clason?

Q. One of the switchmen that worked on the number 2 job.

A. What the complaint was? So I try to recall.

Q. About the conditions under the bridge. Well, I will withdraw that.

A. One time, I don't know who did it, was telling me that walking he gets dirty, so I made a nice path where they could walk away from the ditch.

Q. Who was that?

A. I don't know, that is a long time ago.

Q. Nobody complained—

A. Well, that guy did, but not complained about anything else.

Q. Nothing else?

[fol. 545] A. Every day you find somebody complains about something, you know how it is, along the road, maybe see something here, something there, and we must correct those things as much as we can.

Q. How many complaints that you say did you have about any conditions under the Columbus bridge, just one?

A. Ain't nobody walks over there. That is why there is no complaint.

Q. You mean nobody walks there?

A. No. At night they walk right close to the track, right close to the track when they switch the freight house. Outside of that is no other walking there. They ride.

Q. Don't switchmen in their work walk under this bridge?

A. They don't work there, only at night when they switch the freight house, a little while, and then walk right close to the cars.

Q. Let me understand—excuse me, I want to let you finish—are you finished?

A. Yes, sir.

Q. Let me understand you, I want to be sure. No switchmen or brakemen walk under that bridge one way or the other?

A. This other side.

Mr. Leasure: Just a moment.

The Court: He may ask the question again, go ahead.

[fol. 346] A. This other side, the high side.

Q. You mean they walk on this side?

A. Yes.

Q. Away from the ditch, is that what you mean?

A. Because they go switch West Street on that end. They got no reason to walk over here. Only the car inspector at night, and maybe a brakeman couple up the cars, right close to the track.

Q. Real close to the track, is that it?

A. Yes.

Q. And, of course, this side is always dry?

A. Yes, that side, what do you mean? Yes, well, it is dry, it is dry

Q. Thank you, thank you very much, Mr. Delaria. I appreciate your coming down. That is all, thank you.

The Court: You may step down, Mr. Delaria, and go back to work.

The Court: Ladies and Gentlemen of the jury, we will have a short recess at this time. You will return to the jury room with the admonition that you do not talk about this case to anyone, not even amongst yourselves.

(Thereupon a recess was taken.)

Mr. Leasure: Mr. Clason, please.

[fol. 547] Thereupon the Defendant, further to maintain the issues on its part to be maintained, called as a witness WILLIAM CLASON, who, being first duly sworn, was examined and testified as follows:

Direct examination of William Clason:

By Mr. Leasure:

Q. Will you state your name, please?
A. William Clason.
Q. Where do you live?
A. 10918 St. Mark Avenue.
Q. Are you employed by the Baltimore and Ohio Railroad?
A. Yes, I am.
Q. Are you the same Mr. Clason who testified here in this case last week?
A. Yes, I did.
Q. In what capacity are you employed by the Baltimore and Ohio at the present time?
A. Yard foreman on the west end.
Q. On West Avenue?
A. West end yard.
Q. Is that part of the Clark Avenue yard?
A. Yes, the west end of the Clark Avenue yard.
Q. Now, back in 1953 and 1954, in that general period of time, were you also employed by the Baltimore and Ohio Railroad Company?
[fol. 548] A. Yes, I was.
Q. And in what capacity?
A. Well, both as a yard foreman and brakeman.
Q. What job or jobs were you working on at that time?
A. What is down as the downtown job or run number 2.
Q. Is that the same job Mr. Gallick was working on in that period of time?
A. Yes, it was.
Q. And did you work with Mr. Gallick from time to time?
A. Yes, I did.
Q. On that job?
A. Yes.

Q. Now, Mr. Clason, I have asked you to come back here so that we can get the benefit of your knowledge pertaining to this case. Do you recall when you were here before you were asked certain questions by Mr. Dudnik?

A. Yes.

Q. Do you recall that I at that time didn't ask you any questions?

A. Yes.

Q. I want to find out what you have to tell us in your own words concerning the subjects inquired about by Mr. Dudnik. He asked you whether there was a swamp existing under the Columbus Road bridge back in 1953 and '54, and I think you answered yes.

[fol. 549] Now, if you were using your own language, how would you describe the condition that existed under that bridge at that time?

Mr. Dudnik: There is an objection for this reason, your Honor. The witness has a right, and I think Mr. Leasure has a right to ask him the questions, but not in the form—the form of that question is objectionable, if you were using your own language. He used his own language before.

I think Mr. Leasures has a right to ask him questions, but the form is improper and therefore I object.

The Court: This is now direct examination of this witness. Of course Mr. Leasure may ask any questions that are proper, and I think you might rephrase the question.

Mr. Leasure: If your Honor please, this man was not permitted to use his own language before. He was forced to answer yes or no to language used by Mr. Dudnik.

Mr. Dudnik: I ask that the jury be instructed to disregard the statement of Mr. Leasure.

The Court: The jury will disregard the statement made by Mr. Leasure, and I think Mr. Leasure you may pro-[fol. 550] ceed as though under direct examination, as though this witness was called here for the first time as the Defendant's witness.

Mr. Leasure: You mean, your Honor, I cannot take cognizance of the questions and answers given by this witness previously?

The Court: You sure may take cognizance of it. But you will have to treat this witness as a witness called by the Defendant under direct examination.

Mr. Leasure: I am objecting to the fact that we are required to do that, but I will proceed accordingly.

The Court: Overruled.

Q. Now, Mr. Clason, will you in your own words describe for us the condition that existed under Columbus Road bridge in so far as any water was concerned there back in 1953 and '54 when you were working there on the downtown job?

A. Well, there is, there was a puddle of water there, normally one to two inches deep. But as much as a foot deep during a heavy rain or a flood.

Q. Then after a heavy rain was finished what would happen to that approximate foot of water?

A. Well, it would drain down eventually. During the flood the drain would be plugged up with papers and sticks and tin cans and things.

[fol. 551] Q. Have you yourself observed who if anyone would clean out the accumulation of sticks and paper which would wash down following a rain?

A. Well, I have seen the section boss' men clean it out from time to time after a rain.

Q. Then as soon as they cleaned it out what would happen to the water?

A. It would drain down.

Q. Now, as long as there was not a heavy rain which would wash this material down, what would be the condition of the water under the bridge, how would you describe that?

A. Well, I would describe it as just a puddle of water, that's what it was.

Q. Have you observed where the water comes from that runs down under the bridge there, the Columbus Road bridge?

A. Yes. When it rains it comes down the bank, but a great deal of it comes off the other bridges. The drain pipes on the bridge are broken at the bottom.

Q. What bridge or bridges are you referring to when you say the drain pipe is broken?

A. Both the Superior-High Level Bridge and the Cleveland Union Terminal Railroad bridge.

Q. So we can have an understanding, can you see this, Mr. Clason?

A. Yes, I can.

[fol. 552] Q. Assume that this is the Columbus Road bridge here where I have my pencil, in the center of this red circle, am I now pointing to the Detroit-Superior-High Level Bridge that you just referred to?

A. Yes.

Q. Am I now pointing to—what bridge is this?

A. Well, we call it the Cleveland Union Terminal. I guess it belongs to the New York Central, I am not sure. It is a railroad bridge.

Q. It is a railroad bridge. Is it a B & O bridge?

A. No, it isn't.

Q. Now, where is the broken pipe, is it on this bridge here?

A. On both of those bridges. There are piers—

Q. Here and here?

A. There are piers under the bridge on each side of the B & O tracks, and the pipes extend down along the piers, but they do not enter into a drain, or if they did the bottoms of the pipes are broken off and the water runs off on the ground and down the ditch along the B & O track.

Q. Then does it come in this direction?

A. Yes, it does.

Q. That would be easterly, in railroad directions?

A. Yes.

Q. And down to under the Columbus Road bridge?

A. That's right.

[fol. 553] Mr. Dudnik: Your Honor, I think this is important material and he shouldn't testify for the witness. Objection.

The Court: Counsel will refrain from leading questions.

Q. Then will you tell us, let's take the water that comes down from the Big Four bridge here, from Cleveland Union Terminal, which direction does that water go once it reaches the ground?

A. It flows eastward toward the Columbus Road bridge.

Q. As I am moving my pencil?

A. In that direction, yes.

Q. And then where does it go from there?

A. Well, there is a drain there and it goes into that drain.

Q. You mean an underground drain?

A. Yes.

Q. And which direction is that from Columbus Road bridge, that drain which you just referred to?

A. It also leads eastward.

Q. It leads eastward?

A. Yes.

Q. Now, Mr. Clason, you were asked by Mr. Dudnik about whether you had seen attempts of Mr. Delaria's crew to clean up this area under the bridge.

Do you recall that question?

[fol. 554] A. Yes, I believe so.

Q. And you answered yes. Will you tell us what you meant by that answer, please?

A. Well, I meant that he does from time to time have his men go down there and clean up under the bridge. I know they take our blocks every day that we use to block cars with, we have to hide them in the grass.

Q. You mean that you operating men lay blocks somewhere?

A. We use blocks when we are switching the house, we use them to hold the cars, it is downgrade, it is a hill there eastward, and when we kick cars back into the house we use a block to hold them.

Q. Is that a wooden block?

A. Wooden block. Usually a 2 x 4.

Q. All right, and what do you say happens to those?

A. When they clean up around there they pick them all up.

Q. Now, my question relates more to the Columbus Road bridge area; will you tell us what you meant in your own words when you said that you had seen Mr. Delaria's crew clean up the area or try to clean up the area under the bridge?

A. He has to clean that up because people throw garbage and tin cans and stuff off the bridge down on the right-of-way and into the ditch. When there is a heavy rain

it washes it down into the drain and it plugs it up so they have to clean that out of there to get the water out.

[fol. 555] Q. Now, Mr. Clason, you were also asked about conditions relating to dead pigeons, dead rats, insects, and so forth, under the bridge and in that area.

Will you tell us in your own words what you have observed, and this goes back to 1953 and 1954 now, as to any such conditions either under the Columbus Road bridge or in that immediate area?

A. Well, at that time I might have seen two or three dead pigeons over a period of time under the Columbus Road bridge and a dead rat.

Q. Back in 1953 and '54, were there times, days, occasions when you were there that you would see no dead pigeons under or near Columbus Road bridge?

A. That's right, there were.

Q. And some days there would be as high as how many?

A. Well, I don't think I have seen three dead pigeons all at the same time.

Q. Now, what area are we talking about? I have asked you about Columbus Road bridge and that immediate area. What area do you have in mind when you have answered the question?

A. Well, I would say approximately a hundred feet each way of the Columbus Road bridge.

Q. Would that take it down under Carter Road bridge?

A. Yes.

Q. Now, tell us in your own words what you had observed [fol. 556] back in 1953 and '54 as to any dead rats in that same area?

A. Well, there has been, there was a dead rat under the Columbus Road bridge about that time, I remember seeing that.

Mr. Dudnik: May I have that answer read? Excuse me, Mr. Clason.

(Last answer was read by the reporter.)

Mr. Dudnik: A dead rat, that is all I am interested in.

Q. Was there one or more than one on any one occasion, Mr. Clason?

A. Well, there was more than one. There was two, but under that Columbus Road bridge at any particular time I only saw one.

Q. Are you telling us that there was one time when you saw two in the area that we are talking about?

A. Yes, but not at the same time.

Q. Not at the same time?

A. No.

Q. Will you give us some idea of how long a period of time would pass by back in 1953 or 1954 when you would not see a dead rat at all in this area?

A. Well, I would say probably five or six months.

Q. In other words, you are telling us that five or six months might go by without seeing a dead rat in this area?

A. That's right.

[fol. 557] Q. Then upon occasion you would see one or two I think you indicated?

A. Yes.

Q. But not two at the same time?

A. No.

Q. Now, on the subject of insects, will you tell us in your own words what you have observed relative to any insects either under Columbus Road bridge or the immediate area as compared to elsewhere in the flats area generally?

A. Well, I haven't seen any different insects there than anywhere else, in the flats or in the city for that matter.

Q. Do you recall having seen any particular type or types of insects either under the Columbus Road bridge or close by?

A. Well, I could hardly name them. I don't know. I don't know insects that well. I have seen—

Q. Will you just tell us in your own words what ones you have seen there, and this relates again back in 1953 and 1954, describe them as best you can.

A. Well, I would say there was ants and sand fleas, and Canadian soldiers and mosquitoes and flies. I have never seen any extraordinary bugs.

Q. Will you tell us whether or not you have seen any greater accumulation or numbers of any such insects there

under or near Columbus Road bridge than you would see generally in the flats area at the same time?

[fol. 558] A. Well, the only greater accumulation of one particular type of insect would be when we get the New York Central transfer off Whiskey Island, there are millions of sand fleas over there.

Other than that, I wouldn't say they would be any different than anywhere else.

Q. By Whiskey Island, is that the island that is up on the edge of Lake Erie?

A. That's right.

Q. And by New York Central transfer coming down, what do you mean?

A. On the New York Central Railroad they have a set of tracks there that they deliver cars for the B & O. We also deliver cars for the New York Central. And that set of tracks we call a transfer.

Q. Is that an interchange point between the New York Central and the B & O?

A. That's right.

Q. Do I understand you to say that on occasion when you get a transfer from the New York Central, there would be sand fleas?

A. Yes.

Q. What do you mean by sand fleas? I am not sure I know what one is.

A. I don't either.

Q. Is there any way you can describe it as to size and [fol. 559] appearance?

A. Well, they are a fuzzy little insect.

Mr. Dudnik: Pudgy?

A. Fuzzy.

Mr. Dudnik: Oh, fuzzy.

A. Yes. They have wings. They fly. The wind blows them in off the lake when it is warm, and there is a great number of them that come.

They are similar to Canadian soldiers but not near so large. They are about as big as a fly.

Q. Do they seem to be there at one particular time of the year more than some other?

A. Yes, this time of the year.

Q. This time of the year, you mean June?

A. June and July.

Q. How long did you work on this downtown job, Mr. Clason, back in that period of 1953 and 1954?

A. Well, I worked off and on for the ten years previous to that, but just at that time in '53 I had been there since, well, a little over a year. I don't know exactly, but a little over a year.

Q. And have you worked down there off and on since that time?

A. I worked there five consecutive years, from '53 until last December of '58.

Q. I see, five years on the downtown job?

[fol. 560] A. Yes, sir.

Q. Consecutively?

A. Yes.

Q. Now, at any time that you have been working on the downtown job, have you been bitten by any insect either under or near the Columbus Road bridge?

A. Well, yes, if mosquitoes are insects, I have had mosquito bites.

Q. Except for mosquito bites have you ever had any insect bites in that area?

A. No.

Q. Do you know of any other B & O employee during the time you were down there who suffered any insect bite in that area other than perhaps a mosquito bite?

A. No, I don't.

Q. Would you say that you have suffered any more mosquito bites down there than you get around home or at other places?

A. No.

Q. Mr. Clason, if I can impose upon you to do something for me, does the Baltimore and Ohio Railroad Company have what are known as safety rules?

A. Yes, they have.

Q. And as an operating employee, are you familiar with those?

A. Well, we also have operating rules. I am familiar with both the safety and operating rules, but I can't quote [fol. 561] them word for word.

Q. Well, I won't call on you to do that. But what is the fact as to whether or not B & O employees are required in their job to be conversant with the safety and operating rules of the company?

A. Yes, it is.

Q. They are so required?

A. Yes, they are.

Q. If I may hand you a book entitled Safety Rules, and ask you to turn Safety Rule No. 1, will you look at that and see if that is Safety Rule No. 1 of the Baltimore and Ohio?

A. Yes, it is.

Q. Will you read it to us, please?

Mr. Dudnik: May I see it?

Mr. Leasure: Oh, sure. I thought you knew all those rules.

Mr. Dudnik: I don't represent railroads; you do.

Mr. Leasure: You have seen enough.

Mr. Dudnik: Is this the one?

Mr. Leasure: Yes.

Q. Will you read it into the record, please?

A. (Reading) "When physically able to do so, employe sustaining injury no matter how minor will report it to the supervisor before leaving company premises."

[fol. 562] Q. Will you tell us, Mr. Clason, whether the Baltimore and Ohio has a particular form that is used by the employees to report accidents and any injuries?

A. Yes, they have. It is a form we call—it is known as 790. That is the form number, and it is a personal injury report form.

Q. What can you tell us, Mr. Clason, from your own knowledge and experience during the time that you worked on the downtown job as to what if any close clearance there was at Columbus Road bridge?

A. Well, there is very close clearance under the Columbus Road bridge on boxcars, particularly 50-foot boxcars,

because the car is 15 foot 6 inches, something like that, 15 5½ or 6 inches, and then if it happens to have a staff brake it will extend up another 18 inches.

So that there isn't much more than, well, there isn't any more than 3 inches between the top of the brake and the bottom of the bridge, and from the running board it wouldn't be more than—it would be less than 2 feet.

Q. You say on such a car there would be about a 3-inch clearance between the topmost part of the car and the bottom of Columbus Road bridge?

A. That's right.

Q. As those tracks now exist there?

A. Yes, sir.

[fol. 563] Q. And as they existed at the time you were on the job from 1953 to 1958?

A. That's right.

Mr. Leasure: You may cross-examine.

Cross examination of William Clason.

By Mr. Dudnik:

Q. Mr. Clason, you talked with me about this case in my office?

A. That's right.

Q. And before that did you talk to—rather, before you testified the other day did you talk to any of the gentlemen representing the B & O Railroad?

A. About the case?

Q. Yes.

A. No, I didn't.

Q. Were you up in any of their offices?

A. Before I testified? When you called me?

Q. Yes.

A. No, I wasn't.

Q. And had you given a statement before you testified, to the Claim Agent?

A. Yes, I did, but that was quite a while ago.

Q. After you testified here were you summoned to the offices of the Claim Agent?

[fol. 564] A. After I testified here for you?
Q. For me.
A. Yes, I was.
Q. Where did you go?
A. In the Union Commerce Building, Room 1956.
Q. Baker, Hostetler, and Patterson's office?
A. Yes.
Q. Who was there when you got there that you knew?
A. Well, I didn't know anyone there.
Q. Well, you saw the Claim Agent there, didn't you?
A. I met him there.
Q. Who was he?
A. Pat Glenn.
Q. Pat Glenn. Anyone else?
A. Mr.—
Q. Leasure?
A. Yes, and—
Q. These two gentlemen?
A. Yes.
Q. Anyone else?
A. No, that's all.
Q. What other B & O employees did you see there?
A. Oh, Walter Rady.
Q. Walter Rady is the man who testified the other day?
A. Yes.
[fol. 565] Q. Who else did you see there?
A. Molnar.
Q. Mr. Molnar?
A. Yes.
Q. Who else did you see there?
A. That's all.
Q. Just those two men?
A. Yes, sir.
Q. Then you were read the testimony which you gave in court, were you not?
A. Part of it, yes.
Q. You were shown a transcript of what you testified to, were you not?
A. Part of it, yes.
Q. Now, you say the water comes down, comes up around here and goes down, flows down this way, is that right?

A. Yes. It flows eastward along the—in the ditch along the B & O track.

Q. And that is because the bridge is defective or the pipes in the bridge are defective?

Mr. Leasure: I think I will object to the word defective. That is a conclusion.

The Court: I think he testified they were broken.

Mr. Dudnik: Is broken the same as defective?

[fol. 566] Q. Is it because they were broken?

A. Yes, it is because they were broken.

Q. And that is the City of Cleveland pipes that were broken?

A. I don't know who maintains them. I presume the city does.

Q. Then you said the New York Central pipes were broken?

A. Yes, they are.

Q. No B & O pipes were broken that you know of?

A. We don't have any pipes along there, I mean, we don't have any bridge along there.

Q. So all this water flowed, and all flowed toward this Columbus Road bridge, is that right?

A. That's right.

Q. Then after the water flowed, and the weather was nice, everything was nice and clear all over, was it not, and dry?

A. Well, it wasn't dry under the Columbus Road bridge.

Q. That's the only place it remained wet, isn't it, Mr. Clason?

A. Yes, it was a puddle of water.

Q. Under the Columbus Road bridge, wasn't it?

A. Yes.

Q. And it stayed wet, didn't it?

A. Yes.

[fol. 567] Q. And stayed wet and stayed wet, didn't it, sir?

A. Yes.

Q. Now, you read us the rule book, the rule. Mr. Clason, had you ever fallen while at work?

A. Oh, yes, lots of times.

Q. And received minor injuries?
A. I wouldn't say injuries. I received abrasions.
Q. Would you call an abrasion a minor injury?
A. Well, it might be pretty minor, yes.
Q. Well it is a minor injury, isn't it?
A. Yes.
Q. Did you report that to the Claim Agent?
A. No.
Q. You have had many minor injuries that you didn't report to the Claim Department, haven't you?
A. Oh, yes.
Q. So did the other men?

Mr. Leasure: I will object to that.
The Court: He may answer if he knows.

Q. Do you know?
A. I don't definitely know. I presume they did.
Q. And have you heard of men who sustained minor injuries which later became serious which they then reported to the railroad?
[fol. 568] A. I wouldn't know about that.
Q. You don't know of any such instance, I take it?
A. There could be. I don't personally know of any such instance.
Q. You say there could be but you don't personally know?
A. No.
Q. Now, you heard of no other employee who suffered a bite under the bridge?
A. No.
Q. Did Mr. Molnar—do you know about Mr. Molnar's experience with a bug or insect under that bridge?
A. Yes.
Q. You know about that?
A. Yes.
Q. And you know that a bug of some kind crawled over his neck, don't you?
A. No, I don't know that it was a bug. He said it was.
Q. Then it clamped his thumb, didn't it?
A. That is what he said.

Q. You know about that?
A. I know that he said that.
Q. Well, you weren't there?
A. Yes, I was there.
Q. Did he tell you that?
A. What?
[fol. 569] Q. When you were there?
A. Can I explain it?
Q. Sure.
A. Well, we were riding on the footboard of the back of an engine, him and I, and I saw him raise his hand and go like that on the back of his neck.
Q. That was under the Columbus Road bridge, wasn't it?
A. It was along the River Track east of the Columbus Road bridge, between Columbus Road bridge and Sherwin-Williams.
Q. It was not under the bridge?
A. No.
Q. You are sure of that?
A. Yes.
Q. All right, go ahead and tell me what happened.
A. Well, oh, he said—I was on the outside and the engineer wasn't looking back at us because we were making a movement from point to point.
So he wanted to stop, and so I put the air on the engine and we stopped, and he got out and we both looked for he said a bug was on the back of his neck and stuck on his thumb and he threw it away.
Q. You remember that incident?
A. And it was at night.
Q. You remember that incident, do you not?
A. Yes, and we looked around the right-of-way there [fol. 570] with our lanterns but we didn't see anything and I didn't see any bug.
Q. He told you it was because of Jim Gallick's experience, didn't he, do you remember that?
A. No, I do not remember that.
Q. You were in, you were riding an engine?
A. Yes.

Q. And were you going east?

A. East.

Q. Show me which east would be on this picture, Plaintiff's Exhibit 4?

A. Well, that's west, and east is coming this way.

Q. Fine. So I can show the jury, you were riding an engine which was coming from west to east, as you say it?

A. That's right.

Q. Under the bridge?

A. That's right.

Q. Now, then, I take it that you are a truthful man, Mr. Clason?

A. I am trying my best to be. After all, this goes back six years almost, and it is difficult to remember such details as you require.

Q. As time goes on details escape you more and more, do they not?

A. That's right.

[fol. 571] Q. You would remember facts of an accident five years ago, you would remember them better three years ago, than you would today, would you not?

A. Yes.

Q. Did you ever intend to not tell the truth about this case?

A. No. No, I do not intend to.

Q. At no time did you ever intend to mistake, did you, Mr. Clason?

A. No, I do not.

Q. Nor did you ever before?

A. Not to my knowledge.

Q. Certainly. Now, I am going to hand you—

(Plaintiff's Exhibit 23-A, 23-B, and 23-C were marked for identification by the reporter.)

Mr. Leasure: May I see it, please?

Mr. Dudnik: Yes, you may.

Q. I am going to hand you a paper that has been marked Plaintiff's Exhibit 23-A, 23-B, and 23-C. First I want you to read the name on this sheet. Withdraw that. Read the name written along the side of this sheet.

A. The name is William Clason.

Q. Is that your signature?

A. That is my signature.

Q. Did you write that, sir?

[fol. 572] A. I wrote it.

Q. That is on Exhibit 23-A. Now, I hand you 23-B, and ask you to read the name along the side of that sheet?

A. That is the same name, William Clason.

Q. Did you write that, sir?

A. I wrote it.

Q. Now, I am going to hand you Plaintiff's Exhibit 23-C, and read the last line at the bottom of this.

A. The last line reads "I have read this and it is true, William Clason."

Q. Did you write that, sir?

A. Yes, I wrote it.

Q. And did you sign it, sir?

A. I signed it.

Q. You read it, didn't you?

A. Yes.

Q. And you were telling the truth then, weren't you?

A. I believe to be.

Q. And it was taken from you some two years ago, wasn't it?

A. I don't know just when. About that time.

Q. About two years ago. A gentleman came out and asked you to tell him what you knew about Mr. Gallick, didn't he?

A. Yes, he came out and wanted a statement as to the conditions that we are speaking of under the Columbus Road bridge.

[fol. 573] Q. Now, I am going to read it and you follow me as I read it.

(Reading) "My name is William Clason. I live at 10918 St. Mark Avenue. I have been living at this address for the past 12 years. My phone number is Clearwater 1-3397. I am employed as a brakeman for the B & O Railroad for the past 11½ years."

Did you read that with me?

A. Yes.

Q. And it is plain to read?

A. Yes.

Q. You have no trouble reading it?

A. No.

Q. "James Gallick and I worked together off and on for about ten years. Back in August, the early part, of 1954, we were working what is called the downtown area. It was about this period of time that he had bid in for a west end job."

Did you read that?

A. Yes.

Q. So far it is the truth, isn't it?

A. Yes.

Q. "After he was gone for about two weeks a Claim Agent for the railroad came over and said he wanted a statement from me in relation to James Gallick as he had been bitten by an insect while he was working the downtown area."

Two years ago was that your recollection of the truth, [fol. 574] sir?

A. Well, I recall then two years ago that it may have been more than two weeks, but we put in two weeks as a happy medium, because I didn't know for sure just when it was and I still don't know.

Q. That was a close guess I presume?

A. Yes.

Q. Have I read the truth to you so far?

A. Yes.

Q. "Our job would take us from the Nickel Plate Junction to Whiskey Island during the course of a day's work."

Do I read that correctly?

A. Yes.

Q. And was that the fact?

A. That's a fact.

Q. "A part of each days' work took place by Lime Road near the Columbus Road bridge."

Is that the fact?

A. Yes.

Q. Period. "Now we always worked part of our day here. There is a track of the B & O Railroad which goes under-

neath the Columbus Road bridge, and it is in a depressed and lower area."

A. That's right.

Q. You read that, that is true?

[fol. 575] A. Yes.

Q. Everything contained thus far in your statement which you signed and said was the truth is the truth, isn't it?

A. Yes.

Q. "As a result there is a swamp there." Period. Correct?

A. That's what is there.

Q. It is the truth, isn't it, sir?

A. Well, I don't know what you would call a swamp. That's what we—

Q. When you read that you signed it?

A. Yes, I did.

Q. "There must always be about a foot of water or more there in even good weather and during the rainy weather it is much worse."

I am going to read that again, sir.

Mr. Leasure: Objection to the repetition, your Honor.

Mr. Dudnik: Well, I want to be sure I have it right.

Mr. Leasure: He can argue the case later.

Mr. Dudnik: I am not arguing the case. I am reading this again. I want to be sure I have got it right.

Mr. Leasure: I object to this. I object to the repetition.

[fol. 576] The Court: You have read it.

Mr. Dudnik: Your Honor, all right.

The Court: Unless he did not understand that part.

Q. Did you understand it?

A. Yes, I understand it.

Q. Did you understand the part where it says "There was a foot of water there in dry weather," did you understand that?

A. At times there were.

Q. You said here there always was, sir. Read that again. You didn't say at times here. "There must always be about a foot of water or more there even in good weather, and during the rainy weather it is worse."

That is what you said?

A. That's what I wrote, that's what he wrote.

Q. So even in good weather there was always a foot of water there, when you made this statement, Mr. Clason, wasn't there?

Mr. Leasure: Just a moment.

A. Yes.

Mr. Leasure: Just a moment? We are getting very argumentative here.

Mr. Dudnik: I don't think so.

Mr. Leasure: The thing has been marked, identified, and [fol. 577] it speaks for itself. I have not objected to the piecemeal reading of it although perhaps I could have. I am objecting now to his arguing with the witness as to what it says or doesn't say.

The Court: If the witness disagrees with any part of the statement, counsel has a right to re-refer to that part of the statement.

Where there is no disagreement, counsel ought to move on from where he is.

Mr. Dudnik: Thank you, your Honor.

Q. I will go on reading: "There is not enough drainage there or else it is clogged up."

That is true, isn't it?

A. That's true.

Q. "Now, Paul Delaria, the section foreman, has made several attempts to clear this swamp up, but it was never successful although if they put in a drainage ditch deep enough they could run it to the river which is only about 150 feet away."

You said that?

A. I said that, yes, but I didn't understand the condition there,

Q. Is that part I last read that you didn't understand the condition and that's why you said it, you might not have [fol. 578] said it if you understood the condition?

A. No, I might still have said it at the time but now I know why it can't be drained.

Q. Fine. "As a result of this condition there are quite a bit of bugs, rats, insects, and dead rotting pigeons there."

Did you say that, sir?

A. Yes, I did.

Q. Was it the truth?

A. Yes, it was.

Q. Do you know the meaning of quite a bit?

A. Well, there shouldn't be any there. So I would say that quite a bit would be, if there were two or three or even one, it would be quite a bit, compared to what should be there.

Q. You would say, sir, that you meant that one is quite a bit? Is that what you saw now?

A. Yes—no, that is not what I am saying now. I say, I did say there was two pigeons there at different times.

Q. So I get it straight—I am sorry?

A. And two dead rats there at different times.

Q. Never more than one at a time you said?

A. I never noticed more than one at a time.

Q. Now, then, would you say that is what you meant when you said there are quite a bit of bugs, rats, insects, and dead rotting pigeons there, you meant only one?

A. When your representative questioned me, he asked [fol. 579] me particular questions about the water and the rats and the pigeons and the bugs, and those answers he wrote down. That is his writing. It was in reply to the questions, to specific questions he asked me at that time.

Q. Did you read them?

A. Now we are going into more details of it, and it doesn't seem to me that it applies exactly in the same manner.

Mr. Leasure: About the middle of that answer there was part of it I didn't catch due to the noise. Could I have it read?

(Answer read by the reporter.)

Q. Did you read this statement?

A. Yes, I did.

Q. And you signed that it was the truth?

A. I did.

Q. Now, do you wish to withdraw that statement that there was quite a bit of rats there, do you wish to change that? You can answer yes or no, sir, I don't care.

A. Well, no, I don't wish to withdraw it, because at the time the statement was made it was my honest belief, according to the questions asked me, that was the best answers I could give at that time.

Q. Well, then—

A. I didn't write that down. Your man wrote all that down there.

[fol. 580] Q. But you read it?

A. I read it.

Q. Now, I want to ask you this, I don't want to be unfair with you, I do want to ask you this: You are qualifying at least in my opinion, you are qualifying the words "quite a bit"; on your direct examination you said you never saw more than one, and in this statement you said there were quite a bit of rats.

Now, sir, when did you remember this better, two years ago, or now two years later?

A. Well, I don't still remember too good, but I remember, I believe he asked me the question did I see any dead or rotting rats in that area, and I said yes, I did, and he wrote it down as you read it.

And now you asked me how many and when and where, and that is taxing my memory quite a bit to put a specific date on it. But it was in 1953 I know I saw a dead rat in there, and once previous to that I saw a dead rat in there. So over a period of time I saw dead rats in that puddle.

Q. Fine. Are you finished with your answer?

A. Yes, sir.

Q. Do we agree that you said before your memory was better two years ago about this incident than it is today?

Mr. Leasure: I think I will object to this repetition. It is argumentative.

[fol. 581] The Court: He may ask it.

Mr. Leasure: He has been over it two or three times already.

The Court: You may answer, sir.

A. Yes, sir.

Q. We agree on that?

A. Yes.

Q. Let's go on reading. "The condition was bad several years ago and is still bad."

Did you say that?

A. Yes, it is.

Q. Did you say that?

A. Yes.

Q. And it is still bad?

A. Yes.

Q. "I imagine that if James Gallick was bitten by an insect it could have come from this area. I don't know where or how James Gallick was bitten."

You did say that?

A. Yes. Well, I was asked if he worked in that area, if he could be bitten at that particular place and point, and not knowing whether he was or not, I would say that if there is such a thing he could be.

Q. That is the truth, isn't it?

A. Yes, sir.

[fol. 582] Q. "I gave this information in a signed statement to the Claim Agent for the railroad."

A. I did.

OFFERS IN EVIDENCE

Mr. Dudnik: I offer Plaintiff's Exhibits 23-A, 23-B, and 23-C in evidence at this time, your Honor.

Mr. Leasure: We have no objection.

The Court: Without objection it will be received in evidence.

Mr. Leasure: Are you finished?

Mr. Dudnik: Yes. No more questions.

Mr. Leasure: Just a few, Mr. Clason.

Redirect examination of William Clason.

By Mr. Leasure:

Q. There isn't any date, do you see any date on this statement, will you look at it?

A. I didn't look for a date on it.

Q. Will you look and see if there is one on there? I might have missed it.

A. No, sir, I don't see a date.

Q. Who was this man who came out to see you and who took this statement here, do you recall his name?

A. I don't know his name.

Q. Did he tell you who he was and who he represented?

[fol. 583] A. All he told me, he came to my home, and he told me that he was investigating the case of Jim Gallick, and if I could give him a statement.

Q. Did he have anybody with him that was taking down exactly what was said, exactly what you were saying?

A. No, no. It was just him.

Q. Did he ask you a lot of questions?

A. Oh, yes.

Q. Or a few questions? Did he sit there and talk to you for some time?

A. We went and sat in the kitchen. He wanted to sit there by the table where he could write. About an hour I would say.

Q. You say he was there about an hour?

A. Yes, more or less.

Q. Did it take him an hour to write this statement out?

A. Oh, no. We talked about it before he made that statement out, and he asked me various points in it, and then when we were through talking he wrote out the statement.

Q. Whose writing is this?

A. That is his writing. I didn't write it.

Q. It is his writing?

A. It is my signature.

Q. Whose choice of language is that?

A. That is his, too.

[fol. 584] Q. Did he tell you that he was from Mr. Dudnik's office or didn't he tell you where he was from?

A. He may have, and possibly he did. But I don't recall it. And if he did, I wouldn't know who Mr. Dudnik was.

Q. You wouldn't know who Mr. Dudnik was at that time, all right. Then after he made the choice of words and wrote this out he asked you to sign it?

A. That's right.

Q. And was it his idea or yours that you write here at the end, "I have read this and it is true."

A. He told me to write that.

Q. He told you to write that; he told you how to do it, then?

A. That's right.

Q. Now, your best recollection is that this was taken about two years ago?

A. I believe so. I could have been a little longer.

Q. That would be about 1957?

A. It wasn't any sooner, I am sure. It wasn't any sooner.

Q. That would be about three years after this thing is supposed to have happened?

A. Possibly.

Q. Now, Mr. Clason, I think you have already answered that you don't intend to change anything on this statement, and I want to ask you this question, do you want to change [fol. 585] anything in the testimony that you have given here this morning?

A. No, I don't.

Q. Have you testified truthfully this morning?

Mr. Dudnik: Objection. We assume he is testifying truthfully. That is an improper question.

The Court: He may answer.

A. To the best of my memory, I tried very hard to stick right with the truth.

Q. Tell us whether or not what you have said here this morning in greater detail is simply a statement of your knowledge of this situation in detail, as expressed generally in that statement?

A. Yes, it is. In that statement at that time, conditions weren't so severe with Jim there, as they are today, and I didn't try to hard to refresh my memory as I have since.

Q. When you said there was quite a bit of bugs, rats, insects, and dead rotting pigeons there, did you say over what period of time you were talking about?

A. Not there I didn't.

Q. But when you were asked about over what period of time, you have then told us what you did this morning?

Mr. Dudnik: It is leading, if your Honor please. There is an objection.

The Court: He has answered that question before, any- [fol. 586] way.

Q. I notice, Mr. Clason, that in this statement you don't say—and in the same thing that I just read—that there are quite a bit of dead rats. I will read it again: "There are quite a bit of bugs, rats, insects, and dead rotting pigeons there."

Did you mean to leave the impression by that that there are dead rats there, or what did you mean?

A. I don't know what I meant then.

Q. What is the fact?

A. But now the pigeons, the dead pigeons, over a period of time greatly outnumbered the dead rats. In fact, I haven't seen more than two dead rats in the time, during the time that we worked down there, to my recollection. One of them was in this water puddle.

Q. And where was the other one?

A. Well, the other was over at the end of stub track. We used to have a track number 8, and we kept an old car there, a rubbish car, and it was over by that car.

Q. You see live rats down there from time to time, I mean in this general area?

A. Oh, yes.

Q. Where do they seem to be mostly?

A. Well, you mean in '53 or now?

Q. Well, let's say '53 and '54?

[fol. 587] A. At that time we had an old freight house, it was a number of years old, and it was being torn down, and the rats were coming out from under that freight house, at the time they were tearing it down.

Q. Well, does it refresh your recollection to say that the freight house was torn down in 1951 and '52?

A. I believe it was.

Q. So that would have been before this incident then?

A. Well, I don't think it was completed by '53, I mean, it wasn't cleaned up by '53.

Q. But that is at a point away from Columbus Road bridge, is that correct?

A. Yes.

Q. How about down along the river, what have you seen down there with reference to some rats, live rats?

A. Occasionally you will see rats all along the river.

Q. When you said in this statement and I will read it—"The conditions was bad several years ago and it is still bad," will you tell us what you meant by that?

A. Well, we were talking about the water laying in this depression under the Columbus Road bridge. The water is still laying in the depression under the Columbus Road bridge.

Q. Were you talking just about the water or were you talking about something else when you made that statement?

[fol. 588] A. I presume that we were talking, I believe he asked me about a swamp, and we were talking about the water.

Q. When you made that statement you were talking about the water?

A. Yes.

Q. Did you intend to be talking at that time about dead pigeons or rats or insects, in that statement right there? A. No, I haven't seen them lately. I haven't worked down there for over a year. In the previous years there would occasionally be a dead pigeon or rat along that area.

Q. Occasionally?

A. Yes.

Mr. Leasure: I think that is all.

The Court: Anything further, Mr. Dudnik?

Mr. Dudnik: Yes, I have some further, your Honor.

The Court: Much further?

Mr. Dudnik: I may have. I may have quite a bit and I may not. I don't want to say so until I go over some things.

Mr. Leasure: Well, I have nothing further, your Honor, if we could finish up with this man.

Mr. Dudnik: I don't know whether we can, your Honor. [fol. 589] I won't say.

The Court: I think the jury may want to go out to lunch.

We will recess for lunch now. We will return at 1:45, once more with the admonition that you do not talk with anyone about this case, not even amongst yourselves.

(Thereupon an adjournment was taken to 1:45 p.m., Thursday, June 18, 1959, at which time the following proceedings were had:)